No. 15-1194

Title:	Lester Gerard Packingham, Petitioner v. North Carolina
Docketed:	March 23, 2016
Linked with 15A757	
Lower Ct:	Supreme Court of North Carolina
Case Nos.:	(366PA13)
Decision Date:	November 6, 2015

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jan 15 2016	Application (15A757) to extend the time to file a petition for a writ of certiorari from February 4, 2016 to March 21, 2016, submitted to The Chief Justice.
Jan 20 2016	Application (15A757) granted by The Chief Justice extending the time to file until March 21, 2016.
Mar 21 2016	Petition for a writ of certiorari filed. (Response due April 22, 2016)
Apr 6 2016	Waiver of right of respondent North Carolina to respond filed.
Apr 19 2016	DISTRIBUTED for Conference of May 12, 2016.
Apr 20 2016	Brief amici curiae of Profs. Ashutosh Bhagwat, et al. filed. (Distributed)
Apr 28 2016	Response Requested. (Due May 31, 2016)
May 26 2016	Order extending time to file response to petition to and including June 30, 2016.
Jun 30 2016	Brief of respondent North Carolina in opposition filed.
Jul 20 2016	DISTRIBUTED for Conference of September 26, 2016.
Jul 22 2016	Reply of petitioner Lester Gerard Packingham filed. (Distributed)
Oct 3 2016	DISTRIBUTED for Conference of October 7, 2016.
Oct 11 2016	DISTRIBUTED for Conference of October 14, 2016.
Oct 24 2016	DISTRIBUTED for Conference of October 28, 2016.
Oct 28 2016	Petition GRANTED.
Nov 16 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for the respondent.
Nov 18 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 15, 2016.
Dec 12 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for the petitioner.
Dec 15 2016	Brief of petitioner Lester Gerard Packingham filed.
Dec 15 2016	Joint appendix filed. (Statement of costs filed)
Dec 21 2016	Brief amici curiae of Reporters Committee for Freedom of the Press and the Thomas Jefferson Center for Protection of Free Expression filed.
Dec 22 2016	Brief amicus curiae of The National Association of Criminal Defense Lawyers filed.
Dec 22 2016	Brief amici curiae of Cato Institute, et al. filed.
Dec 22 2016	SET FOR ARGUMENT on Monday, February 27, 2017.
Dec 22 2016	Brief amici curiae of Association for the Treatment of Sexual Abusers, et al. filed.

Dec 22 2016	Brief amici curiae of Electronic Frontier Foundation, et al. filed.
Dec 22 2016	Brief amici curiae of Electronic Privacy Information Center (EPIC), et al. filed.
Dec 30 2016	Record requested from the Supreme Court of North Carolina
Jan 17 2017	Brief of respondent North Carolina filed. (Distributed)
Jan 18 2017	CIRCULATED.
Jan 23 2017	Brief amici curiae of State of Louisiana, and Twelve Other States filed. (Distributed)
Jan 24 2017	Brief amici curiae of Stop Child Predators, and Shared Hope International filed. (Distributed)
Jan 24 2017	Brief amici curiae of Council of State Governments, et al. filed.
Jan 31 2017	Record received from the Supreme Court of North Carolina and North Carolina Court of Appeals. The record is electronic.
Feb 16 2017	Reply of petitioner Lester Gerard Packingham filed. (Distributed)
Feb 27 2017	Argued. For petitioner: David T. Goldberg, Stanford, Cal. For respondent: Robert C. Montgomery, Senior Deputy Attorney General, Raleigh, N. C.
Jun 19 2017	Judgment REVERSED and case REMANDED. Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in the judgment, in which Roberts, C. J., and Thomas, J., joined. Gorsuch, J., took no part in the consideration or decision of the case.
Jul 21 2017	MANDATE ISSUED.
Jul 21 2017	JUDGMENT ISSUED.

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No. 15-1194

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LESTER GERARD PACKINGHAM,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The North Carolina Supreme Court sustained petitioner's conviction under a criminal law, N.C. Gen. Stat. § 14-202.5, that makes it a felony for any person on the State's registry of former sex offenders to "access" a wide array of websites—including Facebook, YouTube, and nytimes.com—that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts. The law—which applies to thousands of people who, like petitioner, have completed all criminal justice supervision—does not require the State to prove that the accused had contact with (or gathered information about) a minor, or intended to do so, or accessed a website for any illicit or improper purpose.

The question presented is:

Whether, under this Court's First Amendment precedents, such a law is permissible, both on its face and as applied to petitioner—who was convicted based on a Facebook "post" in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina (App., *infra*, 1a-35a) is reported at 777 S.E.2d 738. The opinion of the Court of Appeals (App., *infra*, 36a-53a) is reported at 748 S.E.2d 146. The order of the Superior Court (App., *infra*, 54a-65a) is unreported.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on November 6, 2015. On January 20, 2016, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 21, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech." N.C. Gen. Stat. § 14-202.5 is reproduced in the appendix to this petition. App., *infra*, 66a-67a.

STATEMENT

1. Two decades ago, North Carolina, invoking the State's "paramount" interest in protecting the public from sex offenses and the risks of recidivism, enacted a law requiring residents previously convicted of certain sexual and other offenses to provide law enforcement with up-to-date identification and residency information, which is compiled and made

available to the public on a centralized registry. See N.C. Gen. Stat. §§ 14-208.5 *et seq.* (declaring law's "purpose" of assisting law enforcement and the general public by supplying timely and accurate information). See generally N.C. Dep't of Justice, Law Enforcement Liaison Section, *The North Carolina Sex Offender & Public Protection Registration Programs* ("Registry Overview") 11-12 (Sep. 2014).

As have legislatures elsewhere, the North Carolina General Assembly has amended its laws repeatedly in the past decade, adding to the list of "reportable" offenses; imposing more extensive and longer-lasting reporting obligations and broader dissemination; and providing harsher penalties for violations. The Legislature has also enacted an array of rules regulating where registrants lawfully may work, reside, or "be," *e.g.*, N.C. Gen. Stat. § 14-208.18. See Registry Overview at 11-17. Thus, where it might formerly have been said that persons "subject to [North Carolina's] statute [were] free to move where they wish and to live and work as other citizens, with no supervision," *Smith* v. *Doe*, 538 U.S. 84, 87 (2003), registrants now confront a dense thicket of restrictions, backed by criminal penalties.

2. In 2008, as part of legislation aimed at making North Carolina "one of the toughest states, if not the toughest state," in its dealings with those on its registry, the General Assembly enacted N.C. Gen. Stat. § 14-202.5, restricting registrants' internet use. Whitney Woodward, *State Legislators Approve "Jessica's Law,"* Greensboro News and Record, July 17, 2008.

Although an initial version of the law would have imposed obligations on "social networking website" *operators* to ensure that minors obtain adult permission before establishing accounts and afford parents ongoing access, see S.B. 132 § 8, 2007 Gen. Assemb., Reg. Sess. (N.C. 2007), those provisions ultimately were omitted, in favor of one that makes it a felony for persons on the State's registry to "access" any commercial website that [1] "facilitates the social introduction" of people [2] for, *inter alia*, "purposes of * * * information exchanges"; [3] allows users to create "personal profiles" with a name or picture; and [4] provides them ways to "communicate with other users"—provided the site is "know[n]" to not restrict "member[ship]" to adults. N.C. Gen. Stat. § 14-202.5(a), (b). The measure was approved by unanimous votes in both Houses of the General Assembly. See N.C. Gen. Assemb., 2007-2008 Sess., S. Roll Call 1773 (Jul. 18, 2008); *id.* H. Roll Call 1929 (Jul. 18, 2008).

Section 202.5 applies to every person on the registry, including the large numbers who are neither incarcerated nor under criminal justice supervision;[1] and those whose convictions were for nonsexual reportable offenses, and offenses not involving minors, see, *e.g.*, N.C. Gen. Stat. § 14-208.6(d) (requiring registration by those convicted of disseminating "a photographic image of another person underneath or through the clothing," *id.* § 14-202(e)). The statutory criteria have been understood to sweep in many sites not "normally thought of as

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[1] See *Offender Statistics*, N.C. Dep't of Pub. Safety, http://sexoffender.ncsbi.gov/stats.aspx (last visited Mar. 16, 2016).

'social networking' sites," Pet. App. 33a (Hudson, J., dissenting) (citing foodnetwork.com, nytimes.com, amazon.com, and google.com); see *Crime Briefs*, The News Reporter, Feb. 1, 2016 at 4A (reporting prosecution for accessing YouTube). The prohibition does not extend, however, to websites that provide a *single* "discrete service[]," such as "photo-sharing," "electronic mail," "instant messenger," or a "chat room or message board platform" or to ones that "primar[il]y" enable "commercial transactions involving goods or services between [their] members." N.C. Gen. Stat. § 14-202.5(c)(1), (2).

3. Petitioner Lester Packingham was prosecuted and convicted under Section 202.5 for "accessing" Facebook.com in 2010.

Petitioner's registration arose from his 2002 guilty plea, as a 21-year-old student with no prior criminal record, to a single count of taking indecent liberties with a minor, N.C. Gen. Stat. § 14.202.1. See Cabarrus County Super. Ct., Judgment, No. 02CRS008475 (Sep. 16, 2002) (A.O.C. Form 603), at 1. That conviction resulted in a sentence of 10-12 months, followed by 24 months' supervised release, during which time petitioner was subject to "standard conditions" requiring, *e.g.*, that he register, submit to warrantless searches, refrain from illegal substance use, and avoid contact with the complainant. *Id.* 1-3. Apart from directing that petitioner "remain away from" that young woman during the two-year period, the sentencing court imposed no further "special conditions." *Id.* 2.

In April 2010, a Durham police officer came across petitioner's Facebook account and the following "post":

> Man God is Good! How about I got so much favor they dismiss the ticket before court even started. No fine, No court costs, no nothing spent....Praise be to GOD, WOW! Thanks JESUS!

C.A. Rec. 77. That led the officer to arrest petitioner on charges of violating Section 202.5. (Although authorities obtained a warrant and searched petitioner's home, computer, and thumb drives, the only evidence of "access" presented at his criminal trial was a print-out of this one post. See C.A. Rec. 74-77).

a. Petitioner moved to dismiss the charge on First Amendment grounds. The trial court denied that motion, emphasizing the Legislature's responsibility to weigh "disparate interests and to forge a workable compromise," Pet. App. 60a (quoting *State* v. *Bryant*, 359 N.C. 554, 565 (2005)), and concluding that the "balance" Section 202.5 strikes, between "activities of sex offenders" and "protection of minors," was constitutionally permissible, *id.* 64a. Petitioner stood trial, and a jury convicted him of criminal "access."

b. The North Carolina Court of Appeals overturned petitioner's conviction, unanimously holding Section 202.5 unconstitutional, both on its face and as applied.

The court highlighted similarities between Section 202.5 and "social media bans" of other States that had been held unconstitutional by federal courts. See Pet. App. 44a-46a (citing *Doe* v. *Prosecutor, Marion*

County, 705 F.3d 694 (7th Cir. 2013), *Doe* v. *Jindal*, 853 F. Supp. 2d 596 (M.D. La. 2012), and *Doe* v. *Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012)). Like those laws, the court explained, Section 202.5 has an undeniably legitimate purpose—protecting minors from harm—and is "content neutral," in that it does not suppress expression based on its subject or viewpoint. Pet. App. 42a. But like those laws, the court held, Section 202.5 impermissibly "prohibit[s] an enormous amount of expressive activity on the internet," *id.* 46a, including much that is plainly "unrelated to online communication with minors." *Id.* 51a. See also *ibid.* (explaining that Section 202.5 "could be interpreted to ban registered sex offenders from * * * conducting a 'Google' search [or] purchasing items on Amazon.com").

c. The State sought review from the North Carolina Supreme Court, pointing to a feature of Section 202.5 it claimed the appellate court overlooked: While other States' laws sought to prevent registrants from using social networking sites to "contact" minors for improper purposes, the State urged, North Carolina's measure aimed to prevent "information gathering," which could enable predators to "target" young people for criminal purposes. Pet. Discretionary Review 11-12.

The State Supreme Court granted review, and, over vigorous dissent, held Section 202.5 to be "constitutional in all respects." Pet. App. 2a. The court first held that the law should be analyzed as a "limitation on conduct," rather than a speech restriction, *id.* 9a, because it prohibits registrants from "access[ing]" proscribed websites, *id.*, so that the burdens on their ability "to engage in speech on the

Internet" were "incidental[]." *Id.* 12a. The court then accepted the State's asserted interest in "forestall[ing] illicit lurking and contact" by "prevent[ing] registered sex offenders" from "harvest[ing] information," concluding that these are "unrelated to the suppression of free speech." *Id.* 13a-14a.

The court then held that Section 202.5 is "not substantially broader than necessary to achieve the government's interest." Pet. App. 15a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798 (1989)), and therefore "sufficiently narrowly tailored." *Id.* 16a. Although the law "could have been drafted even more narrowly," the court emphasized, it fell well short of "imposing a blanket prohibition against Internet use," *id.* 15a. While "numerous well-known Websites" are foreclosed, the majority continued, Section 202.5 "leaves open ample alternatives," noting that though registrants' "access[ing]" the New York Times website (which does not have an adults-only policy) could give rise to prosecution, they "may [still] follow current events on WRAL.com," the local NBC affiliate's website. *Id.*17a-18a. For similar reasons, the court explained, the statute did not fail as overbroad: Registrants "are prohibited from accessing only those Web sites where they could actually gather information about minors to target" but are otherwise "free to use the Internet." *Id.* 25a.[2]

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[2] The court further held that Section 202.5 was constitutional "as applied," noting that petitioner's offense of conviction had involved a minor and describing his use of the name "J.r. Gerrard" on Facebook—along with a photograph of himself and his phone number—rather than his given name, Lester Gerard Packingham, Jr., as "disguis[ing] his identity,"

Justices Hudson and Beasley dissented, concluding that Section 202.5 is unconstitutional both on its face and as applied in convicting petitioner. Invoking "basic principles of freedom of speech," Pet. App. 28a (quoting *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011)), the dissent explained that Section 202.5 "regulates First-Amendment-protected activity," "directly"—not "'incidental[ly]'"—and does so with "alarming breadth," by "completely barr[ing]" a class of citizens "from communicating with others through many widely utilized commercial networking sites." *Ibid.* Whether or not Section 202.5 warranted strict First Amendment scrutiny, the dissent explained, was of no moment; because North Carolina's law "burdens [so much] * * * more speech than necessary," it "c[ould] not survive" review under less demanding standards. *Id.* 34a.

REASONS FOR GRANTING THE PETITION

This Court's review is required to secure compliance with core First Amendment principles that should have restrained North Carolina's legislature and Supreme Court but did not.

The constitutional defects of the law under which petitioner (and more than 1,000 others) was prosecuted are not subtle or "marginal." Pet. App. 25a. Rather, Section 202.5's affronts to First Amendment principle are basic and serious: The statute singles out a subclass of persons, who are subject to criminal punishment based on expressive, associational, and communicative activities at the heart of the First Amendment, without any

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"indicating his awareness that he was indulging in forbidden behavior." Pet. App. 22a.

requirement that their activity caused any harm or was intended to.

As surely as Section 202.5 should never have been enacted, it should not have been upheld by the State's Supreme Court. This Court's decisions establish that the Freedom of Speech guaranteed by the Constitution requires that all laws regulating First Amendment activity—especially laws as far-reaching and strange as this one—be subject to serious judicial scrutiny, including measures enacted for no censorial purpose. And those precedents require that the judiciary hold officials seeking to suppress or punish First Amendment activity to the burden of showing that the government's purposes could not accomplished without speech regulation or through measures that are significantly less burdensome.

The North Carolina Supreme Court's decision here did the opposite. The court first postulated that Section 202.5 should be analyzed as mere "conduct regulation"—a premise not merely unsupported by, but subversive of, governing precedent. Just as all conduct may be said to contain "a kernel of expression," the inverse also holds true; and the edifice of First Amendment review could not long stand if laws prohibiting purchasing ink and paper were reviewed differently from laws forbidding publication of newspapers. Neither the State nor the decision below suggested that "access" to the proscribed websites is in itself of governmental concern, let alone an "evil"—only the activities, expression and gathering information, *i.e.* Speech, that some registrant might engage in.

The State Supreme Court then offered a species of "scrutiny" that could fairly be described as

intermediate in theory, but supine in fact. Its decision pronounced Section 202.5 "narrowly tailored" for one reason—"it could have been worse"—giving the Legislature credit for what it *did not do*, *i.e.*, enact a complete ban on internet use, but never considering whether the sweeping, onerous burdens the law *does impose* are necessary or why the State's concerns about communications with (or "gathering information" about) minors for nefarious purposes could not be pursued through measures—applicable to registrants and non-registrants alike—directly targeting that deplorable *behavior*.

Unsurprisingly, the decision is also irreconcilable with those of numerous federal courts, which have struck down on First Amendment grounds laws essentially indistinguishable from Section 202.5 as well as measures imposing *lesser* (and more carefully targeted) burdens. Those decisions proceed from a premise fundamentally different from the one evidently at work here: that persons who are no longer under criminal justice supervision are entitled to full, not watered-down, First Amendment protections. North Carolina's residents deserve the same.

That the decision below erred so seriously is not, however, reason for *withholding* this Court's review. Section 202.5 is no mere "silly law." See *Griswold* v. *Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting). Tens of thousands of people are directly subject to Section 202.5's strictures, and the law is being actively enforced, through criminal prosecutions. The activities it proscribes are not only constitutionally protected but increasingly central to participation in civic, cultural, economic, and

spiritual affairs, and the burdens imposed extend to innumerable others who are denied opportunities to associate and communicate with those whom the law regulates directly.

Finally, the Court's intervention here would prod legislatures nationwide to more conscientiously uphold their responsibilities under the Constitution. Laws that abridge speech selectively—and single out misunderstood and unpopular classes of citizens—occupy an important position in this Court's decisions giving meaning to the First Amendment. And as attested by the ever-growing body of enactments harshly restricting registrants' liberties, it is hard to imagine a class of citizens *less able* than those targeted under Section 202.5 to safeguard their rights through the political process.

I. Both North Carolina's Law and The Decision Upholding It Disregard Constitutional First Principles

The state law under which petitioner was convicted is an alarming departure from our legal tradition and an "obvious and flagrant" violation of the First Amendment, *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966).

Section 202.5 targets *only* protected activity; it singles out a discrete and disfavored subset of the populace for far-reaching prohibitions, relegating them to "alternatives" the majority would never accept for itself. The law is prophylactic in a way this Court has long held the First Amendment to condemn: It categorically prevents vast swaths of protected activity, in the belief that some of it may be wrongful. See *Near* v. *Minnesota*, 283 U.S. 697 (1931).

And the legislation's basic theory—that the government's interests in preventing harmful *conduct* may be freely pursued through laws suppressing speech—is likewise one the Court has rejected time and again. "Even where the protection of children is the object, the [First Amendment's] limits on governmental action apply." *Brown*, 131 S. Ct. at 2741.

The measure, moreover, operates through the mechanism of the *criminal* law, authorizing punishment without requiring proof of either "an evil-meaning mind" *or* "an evil-doing hand." *Morissette* v. *United States*, 342 U.S. 246, 251-252 (1952). Under Section 202.5, undisputed proof that the accused *did not* have contact with (or "gather information" about) minors who maintain accounts on a website—or that he accessed the site solely for political or religious purposes—is wholly immaterial.

Indeed, the extent of the law's departure from basic norms may be seen simply by laying the facts of this case alongside those in this Court's First Amendment landmarks. While petitioner was convicted for saying "Thank you Jesus" on an internet site where teenagers (along with one billion adults) may maintain accounts—because *other registrants* might potentially access the site for improper communicative or information-gathering purposes—this Court, in *Brandenberg* v. *Ohio*, 395 U.S. 444 (1969), held the First Amendment to forbid punishment of a defendant whose speech leads to disorder, absent proof his expression is "[1] *directed* to inciting or producing [2] *imminent* lawless action *and* * * * [3] *likely* to produce such action." *Id.* at 447-448 (emphasis added). See also *Virginia* v. *Black*, 538

U.S. 343, 359 (2003) (First Amendment does not permit punishment for "serious[ly] express[ing] an intent to commit an act of unlawful violence to a particular * * * group of individuals," absent proof that the defendant "meant to" put the recipients in fear).[3]

In reaching a contrary result, the decision below spoke the language of this Court's modern First Amendment "tests." But those tests implement principles derived from the foundational precedents: that "regulating speech must be a last—not first—resort," *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 373 (2002), and that "if the Government *could* achieve its interests" without restricting speech, then it "*must* do so." *Id.* at 371 (emphasis added). Those decisions' requirements, on any honest reckoning, only highlight Section 202.5's unconstitutionality.

A. The State Supreme Court's Decision Upholding Section 202.5 as "Conduct Regulation" Is In Fundamental Conflict With This Court's Precedent

The North Carolina Supreme Court did not deny that expressive, communicative, and information-gathering activities over the proscribed internet sites

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[3] The decision below touted the requirement that a defendant be shown to "know[] that the site permits minor children to become members," N.C. Gen. Stat. § 14-202.5(a), as a *mens rea* limitation. Pet. App. 16a. But that provision has limited value in preventing convictions based on inadvertence, see Pet. App. 52a (appellate court's observation that "it is fundamentally impossible to expect [a registrant] * * * to 'know' whether he is banned from a particular Web site prior to 'accessing' it"), and it does nothing to "separat[e] wrongful conduct" from protected expression. *Elonis* v. *United States*, 135 S. Ct. 2001, 2010 (2015).

are fully protected under the Free Speech Clause. See *Reno* v. *ACLU*, 521 U.S. 844, 868-870 (1997). Nor did the court embrace—explicitly—the notion that the Free Speech rights of those targeted by Section 202.5 are, by virtue of their past convictions, diminished to mere "interests," to be freely "compromise[d]" by the Legislature. Cf. Pet. App. 60a (trial court decision). These freedoms, this Court has settled, "flow[] not from the beneficence of the state but from the inalienable rights of the person," *United States* v. *Alvarez*, 132 S. Ct. 2537, 2550 (2012), and are not "lost because * * * of [past] derelictions," *Near*, 283 U.S. at 720 (rejecting State's power to treat as "public nuisance[s]" periodicals that had previously published defamatory statements). See *Doe* v. *Harris*, 772 F.3d 563, 572 (9th Cir. 2014) (Bybee, J.) (affirming that individuals on registry but no longer under criminal justice supervision are entitled to "the full protection of the First Amendment").

The decision's error instead traces to the court's "starting point"—the startling assertion that Section 202.5 should be analyzed as regulating "conduct"—such that its onerous burdens were merely "incidental." Pet. App. 9a. Precedent and common sense condemn that supposition. Wholly unlike laws directed at activity that contains a bare "kernel of expression," Pet. App. 20a (quoting *City of Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989)), or that "combine[s]" "'speech' and 'nonspeech' elements," *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) (upholding measure protecting physical integrity of draft cards that applied to burning for protest purposes), Section 202.5 *only* addresses and punishes First Amendment activity—doing so out of concern that communicating

or gathering information on the internet may (in some cases) *lead to* misbehavior.

The decision offered various bases for its premise, suggesting (1) that the *ultimate* purpose of Section 202.5 is to prevent conduct, *i.e.*, criminal maltreatment of minors; (2) that, while "*communication*" on the prohibited sites is constitutionally protected, "gathering information"—the ostensible focus of Section 202.5—is regulable "conduct," see Pet. App. 18a-19a (distinguishing, *e.g.*, *Doe* v. *Marion County*); and (3) that "access[ing]" networking websites is "conduct" distinct from "posting" or "liking" (or reading) another user's post. Each rationale, however, is plainly refuted by this Court's governing precedent.

First, that the legislature's "essential" purpose, Pet. App. 9a, was "to limit conduct," *ibid.* rather than to suppress disfavored ideas, does not convert direct regulation of speech into an "incidental" burden. Many of the laws that this Court has invalidated under the Free Speech Clause were motivated by similar conduct-focused concerns. See, *e.g.*, *Brown*, 131 S. Ct. at 2739 (preventing violent behavior); *Brandenburg*, 395 U.S. at 448-449 (disorder); *Riley* v. *Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 790 (1988) (fraud). The government's reason for denying the protest permit in *Forsyth Cnty.* v. *The Nationalist Movement*, 505 U.S. 123 (1992), may have been purely fiscal, but its action was speech regulation.

The North Carolina Supreme Court's assumption of a dispositive First Amendment difference between laws regulating "communication" and "information gathering" is even more plainly untenable. Section

202.5 is in fact essentially similar to the measures struck down in *Marion County*, *Nebraska* and *Jindal*: all would punish registrants who "access" forbidden websites, without regard to whether they do so in order to "gather information" or (as petitioner did) express themselves. But in any event, this Court has long held that gathering information is *itself* fully protected under the Free Speech Clause. Thus, *Sorrell* v. *IMS Health, Inc.*, 131 S. Ct. 2653 (2011), rejected Vermont's plea to spare its statute on the ground that the law "regulate[d] not speech but simply access to information." *Id.* at 2665-2666. In rebuffing that defense, the Court reaffirmed what *Stanley* v. *Georgia*, 394 U.S. 557 (1969), described as "well established" decades ago: that the First Amendment protects the "right to receive information." *Id.* at 564.

The North Carolina Supreme Court's principal rationale, that Section 202.5 should be viewed as less suspect because it is directed at a precursor to First Amendment activity—*i.e.*, "access"—see Pet. App. 9a ("Section 202.5 only incidentally 'burdens the ability * * * to engage in speech *after accessing* those Web sites that fall within the statute's reach"), breaks even more seriously from the rules this Court's decisions establish. As the Court has repeatedly noted, *every* activity protected under the Free Speech Clause is effectuated through or preceded by "conduct" of some sort. But a law prohibiting newspapers "from purchasing or using ink" is constitutionally indistinguishable from one restricting their publication, *Sorrell*, 131 S. Ct. at 2667 (rejecting State's "conduct regulation" argument on this basis); accord *Minneapolis Star & Tribune Co.* v. *Minnesota Com'r of Rev.*, 460 U.S. 575, 582 (1983). And a law

prohibiting a class of people from reading certain newspapers would not be more constitutionally tolerable if the legislature made the "trigger" for criminal punishment the physical act of picking up—"accessing"—the paper.

In fact, neither the State nor the decision below seriously suggested that what Section 202.5 prohibits—"access[ing]" a prohibited website by someone on the registry—is *in itself* harmful. On the contrary, although the majority opinion identified activities other than "communication" that implicate the Legislature's protective purpose and can occur on the proscribed sites—*e.g.*, "lurking" and "harvest[ing] information" for illicit purposes, Pet. App. 13a—petitioner's Facebook post expressing delight at beating a traffic ticket is the first item on an inexhaustible list of instances where "access" neither inflicts nor leads to harm of any sort. This Court has held repeatedly that a categorical prohibition like Section 202.5 may be sustained under the First Amendment only "if *each activity* within the proscription's scope is [itself] an appropriately targeted evil," *Frisby* v. *Schultz*, 487 U.S. 474, 486 (1988)—and not when, as here, "the substantive evil" is "merely a possible byproduct of the activity." *Ibid.* (quoting *Los Angeles City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

The State Supreme Court's decision viewed the fact that Section 202.5 prevents much expression that the government would have no interest in suppressing as indicative of its constitutionally benign character. See Pet. App. 10a-11a (concluding that Section 202.5 is "content neutral" because it prohibits all, rather than some, speech on the

websites). But that logic inverts constitutional first principles: As *Near* v. *Minnesota* teaches, prohibiting *all* expression in order to prevent a harmful subset is not a regulatory approach that the First Amendment encourages. See 283 U.S. at 722.

B. The State Supreme Court's Version of "Heightened Scrutiny" Ignores the Basic Rules Laid Down in This Court's First Amendment Decisions

Even in situations where strict judicial scrutiny is not called for, this Court has held that measures restricting First Amendment activities may be enforced only if shown, *inter alia*, to be "narrowly tailored." *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 641 (1994). Accordingly, petitioner's Section 202.5 conviction could not stand unless North Carolina had "show[n]," *McCullen* v. *Coakley*, 134 S. Ct. Ct. 2518, 2539 (2014), (1) that its law "does not * * * burden substantially more [protected activity] than necessary," *Ward*, 491 U.S. at 799—an inquiry that entails examining measures "that could serve its interests just as well," while imposing no (or much fewer) speech burdens, *McCullen*, 134 S. Ct. at 2537; (2) that Section 202.5 "directly advances" a "substantial" governmental interest, *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); *and* (3) "leave[s] open ample alternative channels." *Ward*, 491 U.S. at 791.[4]

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[4] It is hardly self-evident that Section 202.5—which plainly discriminates among speakers and may not qualify as "content-neutral" under the Court's precedents—should have been subject to anything less than "strict" review. See Pet. App. 30a (Hudson, J., dissenting). But that point need not be argued over because, as the dissent explained, Section 202.5 would fail any

The State Supreme Court recited the language of these decisions. But it then subjected North Carolina's law to a form of "scrutiny" that in fact *omitted* every requirement that this Court's heightened scrutiny precedents have held the First Amendment to impose. Rather than compare the amount of speech Section 202.5 prohibits to the quantum "necessary" to advance the government's objective—or consider whether North Carolina "could achieve its interests [through means that] restrict[] less speech," *Thompson*, 535 U.S. at 372—the State Supreme Court pronounced the law narrowly tailored because it sweeps less broadly *than it might have, i.e.*, not imposing "a blanket prohibition against [registrants'] Internet use," Pet. App. 15a. Indeed, it was only by resort to this upside-down conception of "tailoring"—a "test" that could validate *any* law abridging speech—that the State Supreme Court was able to overlook Section 202.5's glaring defects and pronounce the law constitutional "in all respects." Pet. App. 2a.

1. Even if Section 202.5 applied only to true "social networking" websites such as Facebook, it would be a criminal prohibition of truly "alarming breadth," *United States* v. *Stevens*, 559 U.S. 460, 474 (2010). The activities that were of concern to the Legislature—"harvesting information" about and communicating with minors for nefarious purposes—indisputably "comprise[] a minuscule subset" of "the universe of social network activity," *Marion County*,

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possibly applicable test. See *ibid.* Even a truly "incidental burden" is impermissible if it is not "essential to the furtherance of [the government's important] interest." *O'Brien*, 391 U.S. at 377.

705 F.3d at 699, that Section 202.5 punishes—a "universe" that includes artistic, religious, and political expression, gathering information from government sources, and communication with the other adults. See Ryan Neal, *Facebook Gets Older*, International Bus. Times, Jan. 16, 2014, available at http://goo.gl/U38JpJ (reporting that 170 million of 180 million U.S. Facebook users are 18 or older). See *Reno*, 521 U.S. at 876 (holding that "the governmental interest in protecting children * * * [can]not justify an unnecessarily broad suppression of speech addressed to adults.").

As the dissent highlighted, the law's sweep is still more vast. See Pet. App. 31a-34a. The statute's loosely-drafted definition threatens punishment for accessing sites, such as nytimes.com, that are far removed from the feared "social network" prowling scenario; and the law restricts the rights of registrants whose triggering offense was nonsexual or involved an adult victim (as well as the many others who pose no significant risk of engaging in the particular behavior with which Section 202.5 is concerned), see *id.* 32a; p. 3, *supra*.[5]

2. The court likewise failed even to consider more focused measures the State could take (and has taken) to address the behavior Section 202.5 aims to prevent and deter, let alone require that the State

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[5] The opinion below disputed certain examples offered in petitioner's brief and the dissent, but it *did not* deny that Section 202.5 authorizes prosecution for visiting the New York Times website, and the opinion pointedly declined to resolve acknowledged statutory ambiguities. Pet. App. 18a ("leav[ing] for another day what the "know[ledge]" element requires); *id.* 16a (stating that websites with certain characteristics would "not *necessarily* violate the statute") (emphasis added).

"demonstrate that alternative measures * * * would fail to achieve [its] interests," *McCullen*, 134 S. Ct. at 2540. See *id.* ("that the chosen route is easier" is insufficient).

The ordinary way to prevent criminal conduct is to enact, enforce, and strengthen laws forbidding that behavior. See *McCullen*, 134 S. Ct. at 2537; *Schneider* v. *State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."). See also *Riley*, 487 U.S. at 795 (emphasizing, in striking down speech restriction claimed to prevent deception, States' unquestioned power to prosecute fraud). And nothing confines a State to punishing completed misconduct. North Carolina has enacted laws criminalizing "solicitation of [a] child by computer" and "cyberstalking," N.C. Gen. Stat. §§ 14-202.3, 14-196.3; and, to the extent these would not reach the sorts of internet activities the State insisted Section 202.5 prevents (*e.g.*, "lurking" or "gathering information" about minors for criminal purposes), the Legislature could enact a law criminalizing those activities. Or it could revive the provision not enacted in 2008 requiring increased parental oversight of minors' account settings and interactions on these websites. See p. 3, *supra*; *Reno*, 521 U.S. at 877 (invalidating statute, highlighting parents' ability to prevent their children's exposure to inappropriate internet material).

Moreover, for individual registrants incapable of conforming their behavior to the law, see N.C. Gen. Stat. § 14-208.6; *Kansas* v. *Crane*, 534 U.S. 407, 410 (2002), the State presumably could impose focused, more restrictive measures, perhaps prohibiting them

from interacting with (or visiting pages created by) users under age 18—or giving them the option of submitting to special surveillance. Cf. Ind. Code § 11-8-8-8 (requiring that paroled sex offenders who use "internet identifiers" submit to searches of devices).

Indeed, the nature of the problem Section 202.5 addresses affords options absent in other settings. In (unsuccessfully) defending the statute in *Stevens*, the Government argued that the difficulty of identifying persons perpetrating the cruel acts captured on film made prosecuting distributors the "only effective way" of combatting abuse, see 559 U.S. at 492 (Alito, J., dissenting). But here, users' own computers (and website operators' servers) provide detailed and precise information about their online activities and interactions.

3. Nor did the North Carolina Supreme Court seriously address whether this law "direct[ly] and materia[lly]" advances an important State interest. in a direct and material way. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 478 (1995). Section 202.5's design is extraordinarily *in*direct: the law denies access to a broad range of websites to a large class of people to make it more difficult for a tiny subset who *might* gather information that *might* lead to communication with minors that *might* be a precursor to harmful behavior. Whether the law advances North Carolina's undeniably vital interest—protecting minors from internet-enabled predation—"materially" is also doubtful. That interest applies equally to *any* person who would access the internet in order to identify minors for criminal purposes. Yet North Carolina has passed no general criminal law prohibiting that behavior, and Section 202.5 targets

only those on the State's registry (and *all* registrants—regardless of individual circumstances), notwithstanding the reality that persons with no prior sex offense convictions commit the overwhelming majority of such crimes.[6] And the Legislature chose not to enact the proposed provision that would have strengthened parental involvement—but entailed obligations for website operators, whose concerns presumably receive a more careful hearing than do registrants'. See *Greater New Orleans Broad. Ass'n, Inc.* v. *United States.*, 527 U.S. 173, 189-190 (1999) (holding that statute prohibiting airing of advertising for privately-owned casinos failed to advance asserted interest in "alleviating the social costs of casino gambling by limiting demand," when Congress simultaneously encouraged *tribal* casino gambling). And while the Section 202.5(c) exceptions do not, as the decision insisted, mitigate its unconstitutionality, they likely *do* detract from the objectives claimed: The State has never explained, for

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[6] Although any recidivism by a person convicted of a serious crime is a rightful and important governmental concern, empirical evidence refutes widely-held assumptions about dangers posed by registrants. A comprehensive Justice Department study found that recidivism rates for sexual offenders are significantly *lower* than for persons convicted of other crimes, see Patrick A. Langan et al., U.S. Dep't of Justice, *Recidivism of Sex Offenders Released from Prison in 1994*, at 14 (2003), and that persons previously incarcerated for *non*sexual offenses accounted for six times more *sex* crimes than those whose prior conviction was for a sexual offense. *Id.* at 24. Public discussions also often fail to distinguish between the comparatively small subset of registrants who at some point re-offend (including by violating a parole condition) and the truly tiny subpopulation who suffer from "personality disorder[s]" that render them incapable of controlling predatory impulses. See *Kansas* v. *Hendricks*, 521 U.S. 346, 358 (1997).

example, why a person intent on "harvesting information" about minors could not "lurk" in a single-purpose "chat room" site. Cf. Pet. App. 15a (describing such sites as "exclusively devoted to speech").

4. The North Carolina Supreme Court's "scrutiny" of Section 202.5 concluded by contorting the requirement that a law regulating speech leave open "ample" "alternative channels" for the protected activity. *Ward*, 491 U.S. at 791. Reprising the "glass half-full" approach, the court held this requirement met because the internet offers "myriad sites that do not run afoul of the statute," Pet. App. 18a, noting, for example, that registrants may lawfully "follow current events on WRAL.com," even if it is a felony for them to "access" nytimes.com, *id.* 17a, and that other "methods of communication[,]" including "traditional mail[] and phone calls, * * * are unrestricted," *id.* 18a. But this Court's cases instruct that the First Amendment does not allow "the exercise of [a person's] liberty of expression in appropriate places [to be] abridged on the plea that it may be exercised in some other place"—any more than it permits "a statute ban[ning] leaflets on certain subjects as long as individuals are free to publish books," *Reno*, 521 U.S. at 880 (quoting *Schneider*, 308 U.S. at 163). The decision's own example largely refutes its conclusion: people visit the New York Times website not merely to "follow current events," but also to read its opinion and editorial pages and proprietary content, search its archives, and engage with others across the Nation in robust comment sections. See also Google, *Official Blog*, Dec. 16, 2015, available at https://goo.gl/ALvJdU (announcing that upcoming

presidential debate would feature "questions from the YouTube community").

As for true social networking websites, it is essentially definitional that equivalent "alternatives" will not exist: the ideas and information exchanged derive from interactions among the networked users involved. The burdens Section 202.5 imposes, moreover, are cumulative: registrants are indisputably prohibited from two of the top five U.S. websites and arguably from all five, see Alexa, "Top Sites in the United States," www.alexa.com/topsites/countries/us, which account for billions of users far beyond North Carolina's borders. See Facebook Newsroom, "Company Info," available at newsroom.fb.com/company-info/ (Facebook has 1.59 billion monthly users, 84% residing outside U.S. and Canada).[7] And registrants

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[7] In the court below, the State pointed to a "statement of rights and responsibilities" on the Facebook website that it argued did not allow petitioner (and other registrants) to maintain accounts. That web page—which was not part of the case record—has nothing to do with the constitutionality of North Carolina's law. Section 202.5 indisputably applies to sites that *would* otherwise welcome registrants, thereby criminalizing protected speech on private property that the owner *invites*. See *Sorrell*, 131 S. Ct. at 2665 (highlighting significance of fact that statute "imposed a restriction on access to information in private hands"). And even if the cited language created a contractual obligation, neither Section 202.5 nor any other North Carolina law imposes *criminal* punishment for violating private agreements with website operators. (Nor could they: Facebook also bars users from posting material that is "sensational," or "disrespectful," or "show[s] excessive amounts of skin." See "Advertising Policies," www.facebook.com/policies/ads/#prohibitedcontent). Finally, the cited language does not purport to prevent anyone from viewing pages (*i.e.* "gathering information") on the Facebook

must also invest great effort, on pain of criminal prosecution, determining which sites fall on which side of the hazy line separating constitutionally-protected from felonious "access." See *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003) (when threat of liability induces persons "to abstain from protected speech," they "harm[] not only themselves but society as a whole.").[8]

5. Finally, though the facial invalidity of Section 202.5 is established without resort to the "strong medicine" of First Amendment overbreadth doctrine, see Pet. App. 24a (quoting *New York* v. *Ferber*, 458 U.S. 747, 769 (1982)), the decision below misunderstood controlling precedent on that point also. This case is the antithesis of one where a person whose conduct falls within a law's "plainly legitimate sweep" is nonetheless entitled to relief, on account of the relative "number of [the law's *other*] applications [that] are unconstitutional," *Stevens*, 559 U.S. at 473 (internal citation omitted). Section 202.5 has *no* "legitimate sweep": Though the State presumably *could* enact a prohibition on using—or "accessing"—a networking website for predatory purposes, it has not done so. And if such a law were in force, petitioner,

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site—only from registering an "account." See Facebook, "Terms of Service," www.facebook.com/legal/terms.

[8] The decision below concluded—consistently with this Court's precedent—that petitioner, whose conviction involved accessing Facebook, could not raise a free-standing vagueness challenge based on the statute's enigmatic "social networking website" definition, Pet. App. 27a. But determining his facial challenge entails evaluating the adequacy of "alternative channels," and it is relevant to *that* inquiry that persons subject to Section 202.5 lack notice as to *which* potential alternatives are permissible.

whom no one has alleged improperly sought or "harvested" information when he accessed Facebook.com in 2010, would be outside its ambit. The only support the decision offered for concluding that Section 202.5 goes no more than "marginal[ly]" beyond a "plainly legitimate" core was the opinion's earlier "detailed * * * analysis" of "tailoring," Pet. App. 25a—which, in fact, contains *no* analysis of how much protected activity Section 202.5 sweeps in, highlighting instead how much protected activity the law leaves unpunished. See p. 19, *supra*.[9]

II. The State Supreme Court's Decision Also Conflicts With Decisions of Numerous Lower Courts

Unsurprisingly, given its departures from bedrock principles, the decision below conflicts with those of several federal courts of appeals and is in stark tension with numerous others. In fact, other courts have overturned measures imposing *far less* onerous and sweeping burdens upon internet activities of individuals entitled to *less* robust constitutional protections (*e.g.*, those still subject to supervised release). This stark divergence in the extent of First

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[9] Although this facial challenge should succeed without resort to the overbreadth doctrine's special rules, petitioner presented an overbreadth challenge in all three courts below, and those rules might have relevance in disposing of arguments arising from unusual applications, such as to registrants who are currently incarcerated, who generally do not enjoy the full measure of constitutional protection, see *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), but likely do not have internet access, either.

Amendment protection available from State to State is itself reason for this Court's intervention.

1. Courts of appeals have held, in square conflict with the conclusion below that Section 202.5 should be analyzed as "conduct" regulation, that laws regulating registrants' internet activities "directly and exclusively burden speech." *Harris*, 772 F.3d at 573. Accord *Marion County*, 705 F.3d at 697 (Indiana law banning registrants from accessing "social networking" websites "preclude[d] expression through the medium of social media, [and] also limit[ed their] right to receive information and ideas.") (internal citations omitted). And in *Doe* v. *City of Albuquerque*, 667 F.3d 1111 (10th Cir. 2012), the Tenth Circuit had no difficulty seeing that an ordinance banning registrants from public libraries merited scrutiny as a direct regulation, rather than one addressing the "conduct" of entering ("accessing") the library. Indeed, the constitutional right vindicated in that case, "the First Amendment * * * right to receive information," *id.* at 1120, is the very one the decision below treated as unprotected "conduct."

2. The division over basic First Amendment principles is made especially apparent by contrasting the State Supreme Court's decision with the Seventh Circuit's in *Marion County*, which considered—and rejected on First Amendment grounds—a similar "social networking" website ban, applicable to a similar subset of individuals. The Seventh Circuit concluded, in terms that could—and should—have been applied to Section 202.5, that Indiana's law was not narrowly tailored, because the activity the State sought to prevent, internet communications between

predators and minors, "comprise[d] a minuscule subset of the universe of social network activity." 705 F.3d at 699. Indiana's important crime prevention goals, the Seventh Circuit recognized, did "not license the state to restrict far more speech than necessary to target the prospective harm." *Id.* at 701. See also *Doe* v. *Jindal*, 853 F. Supp. 2d at 605 (holding that statute was not "crafted precisely or narrowly enough—as is required by constitutional standards—to limit the conduct it seeks to proscribe").

The majority opinion below, straining to deny a conflict, reasoned that Section 202.5 is somewhat less sweeping than was Indiana's law and that the Seventh Circuit did not squarely address the "gathering information" rationale advanced in this litigation for Section 202.5. But these efforts are unavailing. The precise contours of the statute did not figure in the *Marion County* decision's First Amendment analysis, which focused on the vast amount of protected activity unnecessarily burdened. (In fact, the Indiana law, like North Carolina's, exempted "electronic mail program[s and] message board[s]," though not "chat rooms," and it only applied to certain registrants. See 705 F.3d at 695-696 & n.1.). And while the Seventh Circuit noted that an alternative justification might be ventured in the future, the court observed that it too might "burden[] a 'substantially broader' than necessary group * * * who will not use the Internet in illicit ways." *Id.* at 701 (citing *Ward*, 491 U.S. at 800).[10]

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[10] In the wake of the Seventh Circuit's decision, Indiana amended its law to provide punishment only for those who violate a *specific term of supervised release* that "prohibits the offender from using a social networking web site * * * to

3. The extent of the North Carolina Supreme Court's deviation is further apparent from appellate decisions addressing (and, with one exception, invalidating) measures requiring registrants to provide their "internet identifiers" to the government. See *Doe* v. *Harris*, 772 F.3d 563; *White* v. *Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010); see also *Doe* v. *Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015) (invalidating law on vagueness grounds), No. 15-36 (6th Cir. argued Jan. 27, 2016); but see *Doe* v. *Shurtleff*, 628 F.3d 1217 (10th Cir. 2010) (upholding a narrower version of such a statute). These laws impose a far less onerous burden than does Section 202.5: They do not purport to prohibit registrants from "accessing" any *site* on the internet, including "social networking" ones, and the laws *allow* registrants to communicate and express themselves pseudonymously, so long as law enforcement is told of their identity. Yet these measures have been held incompatible with the First Amendment, based on their potential to chill the registrants' constitutionally-protected right to speak anonymously. No court that has invalidated such a law, as incompatible with the principle that persons previously convicted but no longer under criminal justice supervision enjoy full First Amendment rights, could possibly approve Section 202.5's sweeping criminal prohibition.[11]

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communicate * * * with a [minor]." Ind. P.L. 247-2013 § 8, codified at Ind. Code § 35-42-4-12 (2014) (emphasis added).

[11] The Tenth Circuit in *Shurtleff* upheld a law the Utah Legislature had amended in response to a district court decision declaring it unconstitutional, 628 F.3d at 1221, and only after

4. The North Carolina Supreme Court's decision is similarly irreconcilable with decisions of numerous federal courts that have rejected as overly burdensome *supervised release conditions* that restrict internet use by those convicted of sex offenses. Such conditions are imposed (1) on persons who—unlike petitioner—are *not* entitled to the full constitutional liberties, see *Samson* v. *California*, 547 U.S. 843, 857 (2006); (2) on an individualized basis, after notice and opportunity to be heard, and (3) for a limited duration, in the immediate aftermath of release from prison. But they nonetheless have been subject to far more serious scrutiny, under what is essentially a "rational basis" standard, than Section 202.5 received from the North Carolina Supreme Court. See 18 U.S.C. § 3583 (requiring conditions be "reasonably related" to, *inter alia*, "the nature and circumstances of the offense" and "the defendant's history and characteristics," and impose "no greater deprivation of liberty than is reasonably necessary").

As the Third Circuit explained in a case overturning a condition imposed on a person convicted of a sex offense, "[w]hen a ban restricts access to material protected by the First Amendment, courts must balance the [§ 3583] considerations against the serious First Amendment concerns endemic in such a restriction." *United States* v. *Thielemann*, 575 F.3d 265, 272-273 (3d Cir. 2009) (internal quotation marks omitted). In *United States* v. *Perraza-Mercado*, 553 F.3d 65 (1st Cir. 2009), the court held that a condition prohibiting the defendant, convicted of knowingly engaging in sexual conduct

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giving the amended version a narrowing construction, *id.* at 1223-1224, to avoid constitutional difficulty.

with a female under the age of twelve, from accessing the internet in his home for fifteen years, amounted to "a greater deprivation of his liberty than [was] reasonably necessary for his rehabilitation." *Id.* at 68-69. The Second Circuit in *United States* v. *Sofsky*, 287 F.3d 122 (2d Cir. 2002), overturned for similar reasons a condition prohibiting the defendant, convicted of receiving child pornography, from accessing a computer, the internet, or a bulletin board system without his probation officer's approval during his three-year supervised release term.

To be sure, several of the invalidated restrictions applied even more broadly than does Section 202.5. But it bears emphasis that most were temporary in duration and imposed on individuals who had committed offenses involving use of the internet. And none *categorically* forbade accessing any website—instead requiring that the defendant either refrain *or* obtain approval, and there is no reason for assuming that permission would have been withheld for a "post" expressing gratitude for a favorable traffic court outcome.

III. This Case Warrants The Court's Intervention

The statute under which petitioner was convicted is significant not only for the extent of its departure from core First Amendment principles but also for its grave and far-reaching real-world consequences. Section 202.5 is no quaint holdover. The law, which regulates more than 21,000 persons, was enacted, unanimously, within the past decade, and it has been enforced through more than 1,000 criminal

prosecutions.[12] Cf. *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting) (questioning need to invalidate law that "as a practical matter [was] obviously unenforceable").

Absent this Court's intervention, law-abiding individuals singled out under Section 202.5 will continue to face criminal jeopardy for activities—including expression, association, communication, and receiving information—that not only are at the core of the First Amendment's Free Speech guarantee but that are increasingly central to participation in the Nation's economic, cultural, religious, and political life. See *United States* v. *Peterson*, 248 F.3d 79, 83 (2d Cir. 2001) (describing internet access as "virtually indispensable in the modern world of communications and information gathering.").

The burdens the statute imposes radiate beyond the individuals directly threatened with punishment, abridging the rights of registrants' family members, friends and others sharing their recreational interests, political and religious views, and artistic sensibilities who want to associate and communicate with them. See *Virginia State Bd. of Pharm.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) (affirming that First Amendment "protect[s] the right of the speaker" and the "right of the listener to receive the information sought to be

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[12] See *Offender Statistics*, *supra* n.1; John H. Tucker, *Durham Man Challenges Law on Sex Offenders and Social Networking Sites*, Indyweek, (May 29, 2013) (reporting that 1,136 charges under Section 202.5 between 2009 and 2012). Nationwide, there are nearly 850,000 persons on similar registries. U.S. Dep't of Justice, *Sex Offender Registration and Notification in the United States: Current Case Law and Issues* at 4 n.24 (Dec. 2015).

communicated").

That those burdens are imposed on the class of persons who, by virtue of a prior conviction, are "registered in accordance with Article 27A of Chapter 14 of [North Carolina's] General Statutes," N.C. Gen. Stat. § 14-202.5(a), does not alleviate, but instead heightens, cause for First Amendment concern. More than eight decades ago, the Court settled that Free Speech rights are not "lost" on account of "[past] derelictions," *Near*, 283 U.S. at 720. And although the protections of the First Amendment do not depend on the "value" of communication suppressed—cat videos, political commentary, and celebrations of traffic court victories enjoy equal status, see *Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 65-66 (1981)—people with prior criminal convictions have important things to communicate. See *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U.S. 105, 122 (1991) (striking down "Son of Sam" statute, identifying historically significant works that "depict[ed] the [author's] crime").

This Court's First Amendment cases have long condemned "regulations that discriminate based on * * * the identity of the speaker," *Los Angeles Police Dep't* v. *United Reporting Pub. Corp.*, 528 U.S. 32, 47 n.4 (1999) (Stevens, J., dissenting), or burden "a narrow class of disfavored speakers," *Sorrell*, 131 S. Ct. at 2668. See also *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 340 (2010); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 232 (1987). Such selective abridgments arouse heightened concern because of the danger that "the democratic majority" will enact restrictions of a politically marginalized minority that they would

never "accept for themselves." *Cruzan* v. *Dir., Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). Indeed, landmark First Amendment decisions attest to a special role for this Court in safeguarding from State incursion the Free Speech rights of those who are misunderstood or vilified. See, *e.g.*, *West Virginia* v. *Barnette*, 319 U.S. 624 (1943); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

This case calls for such intervention. The dynamic that led members of the North Carolina General Assembly—unanimously—to enact Section 202.5 is one that continues to be replayed in legislatures across the Nation. The "acorn[s]" sown in the early 2000s, when this Court upheld straightforward registration and notification requirements, have yielded not a lone "mighty oak," *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 622 (1986) (Rehnquist, J., dissenting), but a dense thicket of restrictive laws whose undeniable effect and only evident purpose is to make more difficult the lives of persons on sex offender registries. See Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L.J. 1071, 1073 (2011-2012) (explaining that measures have "spiraled out of control because legislators, eager to please a fearful public, have been given unfettered freedom by a deferential judiciary").

"A State cannot * * * deem a class of persons a stranger to its laws." *Romer* v. *Evans*, 517 U.S. 620, 635 (1996). Nor may a State (or a state court) deem a class of persons a stranger to the protections of the First Amendment. When the government "deprives

the disadvantaged person or class of the right to use speech," it deprives them of their ability "to establish worth, standing, and respect." *Citizens United*, 558 U.S. at 340-341. This Court's review is needed to ensure that state legislatures and state courts, bound to uphold the federal Constitution, act in accordance with those precepts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2016

Appendix

IN THE SUPREME COURT
OF NORTH CAROLINA
No. 366PA13

FILED: 6 NOVEMBER 2015

STATE OF NORTH CAROLINA

v.

LESTER GERARD PACKINGHAM

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, __ N.C.App. __, 748 S.E.2d 146 (2013), vacating a judgment entered on 30 May 2012 by Judge William Osmond Smith in Superior Court, Durham County. Heard in the Supreme Court on 8 September 2014.

Roy Cooper, Attorney General, by Anne M. Middleton and David L. Elliott, Assistant Attorneys General, for the State-appellant.

Glenn Gerding, Appellate Defender,[1] *for defendant-appellee.*

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[1] Glenn Gerding was appointed to the position of Appellate Defender on 1 November 2015. His motion to withdraw as private assigned counsel was allowed by this Court on 5 November 2015. His motion to represent defendant through this Court's appointment of the Appellate Defender was also allowed on 5 November 2015.

EDMUNDS, Justice.

The Court of Appeals vacated defendant's conviction for accessing a social networking Web site as a registered sex offender, finding that the applicable statute, N.C.G.S. § 14-202.5, is unconstitutional both on its face and as applied to defendant. We conclude that the statute is constitutional in all respects. Accordingly, we reverse the holding to the contrary of the Court of Appeals.

In 2008, the General Assembly enacted N.C.G.S. § 14-202.5, which bans the use of commercial social networking Web sites by registered sex offenders. In April 2010, Officer Brian Schnee of the Durham Police Department began an investigation to detect such sex offenders living in Durham who were illegally accessing commercial social networking Web sites. Officer Schnee identified defendant Lester Gerard Packingham (defendant), who had been convicted in 2002 of a sexual offense in Cabarrus County, North Carolina, as a registered sex offender subject to N.C.G.S. § 14-202.5. Officer Schnee located defendant's name and photograph on the North Carolina Department of Justice Sex Offender Registry. While investigating the Web site Facebook.com, Officer Schnee found a user profile page that, based upon the profile photo, he believed belonged to defendant. Although the name on the Facebook account was "J.R. Gerrard," Officer Schnee was able to confirm that the Facebook page in fact was defendant's. During a subsequent search of defendant's residence, officers recovered a notice of "Changes to North Carolina Sex Offender Registration Laws" signed by defendant describing commercial

social networking Web sites that he was prohibited from accessing. This document was admitted into evidence at trial.

On 20 September 2010, defendant was indicted by a Durham County grand jury for violating N.C.G.S. § 14-202.5. On 9 December 2010, defendant filed a motion to dismiss the charge in Superior Court, Durham County, contending that section 14-202.5 is unconstitutional on its face or as applied to him. On 19 April 2011, the trial court entered an order denying defendant's motion. The trial court's order included a finding of fact that both the State and defendant agreed that Facebook.com is a social networking Web site as contemplated by N.C.G.S. § 14-202.5. The trial court declined to address defendant's facial challenge but found that N.C.G.S. § 14–202.5 was constitutional as applied to defendant. On 22 June 2011, the Court of Appeals denied defendant's petition for certiorari.

The case went to trial and, after considering evidence that defendant maintained a Facebook page, a jury on 30 May 2012 found defendant guilty of one count of accessing a commercial social networking Web site by a registered sex offender. The trial court sentenced defendant to a term of six to eight months of imprisonment, suspended for twelve months, and defendant was placed on supervised probation.

Defendant appealed to the Court of Appeals, challenging the constitutionality of N.C.G.S. § 14-202.5. That court determined that N.C.G.S. § 14-202.5 "plainly involves defendant's First Amendment rights . . . because it bans the freedom of speech and association via social media" and concluded that intermediate scrutiny was appropriate. *State v.*

Packingham, __ N.C. App. __, __, 748 S.E.2d 146, 150 (2013). While acknowledging the legitimate state interest in protecting children from sex offenders, the Court of Appeals found that the statute "is not narrowly tailored, is vague, and fails to target the 'evil' it is intended to rectify" because it "arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal." *Id.* at __, 748 S.E.2d at 154. The court further concluded that the language of N.C.G.S. § 14-202.5 "lacks clarity, is vague, and certainly fails to give people of ordinary intelligence fair notice of what is prohibited." *Id.* at __, 748 S.E.2d at 153. Accordingly, finding that the statute violates the First Amendment, the Court of Appeals held the statute unconstitutional on its face and as applied, and vacated defendant's conviction. *Id.* at __, 748 S.E.2d at 154. On 7 November 2013, this Court allowed the State's Petition for Discretionary Review.

Statutes are presumed constitutional, *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991), and the interpretation of a statute is controlled by the intent of the legislature, *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294-95 (1975). We review challenges to the constitutionality of a statute de novo. *In re Adoption of S.D.W.*, 367 N.C. 386, 391, 758 S.E.2d 374, 378 (2014) (citing *Libertarian Party of N.C. v. State*, 365 N.C. 41, 46, 707 S.E.2d 199, 202-03 (2011)).

Defendant argues that N.C.G.S. § 14-202.5 is unconstitutional both on its face and as applied to him, contending that the statute violates his right to free speech as guaranteed by the United States and North

Carolina Constitutions. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); N.C. Const. art. I, § 14 ("Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained . . . ."). As we begin our analysis, we note that while these constitutional provisions appear absolute, "[h]istory, necessity, and judicial precedent have proven otherwise: 'Freedom of speech is not an unlimited, unqualified right.' " *Hest Techs., Inc. v. State ex rel. Perdue,* 366 N.C. 289, 297, 749 S.E.2d 429, 435 (2012) (quoting *State v. Leigh,* 278 N.C. 243, 250, 179 S.E.2d 708, 712 (1971)), *cert. denied,* __ U.S. __, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013). In addition, when analyzing alleged violations of our State Constitution's Free Speech Clause, this Court has given great weight to the First Amendment jurisprudence of the United States Supreme Court. *See State v. Petersilie,* 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993) (adopting that Court's First Amendment jurisprudence "[i]n this case").

The issue before us is whether the proscription of access to some social networking Web sites violates the First Amendment. An as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable. *Frye v. City of Kannapolis,* 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999). A facial challenge maintains that no constitutional applications of the statute exist, prohibiting its enforcement in any context. *Id.* The constitutional standards used to decide either challenge are the same. *Edwards v. District of Columbia,* 755 F.3d 996, 1001 (D.C. Cir. 2014).

We begin by considering defendant's facial challenge, cognizant that a facial attack on a statute imposes a demanding burden on the challenger. *United States v. Salerno,* 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987). This Court rarely upholds facial challenges because "[t]he fact that a statute 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.' " *State v. Thompson,* 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quoting *Salerno,* 481 U.S. at 745, 107 S. Ct. at 2100, 95 L. Ed. 2d at 707).

The First Amendment is triggered by regulations that burden speech, so we must make an initial determination whether N.C.G.S. § 14-202.5 is a regulation of speech or a regulation of conduct. The distinction is critical because a statute that regulates speech is "subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Burson v. Freeman,* 504 U.S. 191, 198, 112 S. Ct. 1846, 1851, 119 L. Ed. 2d 5, 14 (1992) (plurality) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794, 804 (1983)). First Amendment protection of speech is extended to conduct only when the conduct in question "is inherently expressive." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.,* 547 U.S. 47, 66, 126 S. Ct. 1297, 1310, 164 L. Ed. 2d 156, 175 (2006). In contrast, a regulation that governs conduct while imposing only an incidental burden upon speech "must be evaluated in terms of [its] general effect." *United States v. Albertini,* 472 U.S. 675, 689, 105 S. Ct. 2897, 2906, 86 L. Ed. 2d 536, 548

(1985). An incidental burden on speech is permissible "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.*

The statute at issue provides in pertinent part:

(a) **Offense.** — It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

N.C.G.S. § 14-202.5 (2013).

This statute addresses the ability of registered sex offenders to access some social networking Web sites. We concluded in *Hest* that legislation banning the operation of sweepstake systems primarily regulated "noncommunicative conduct rather than protected speech." 366 N.C. at 296, 749 S.E.2d at 435. The plaintiff in *Hest* argued that video games which were

used to announce the results of the sweepstakes should be protected by the First Amendment. We disagreed, finding that the statute at issue in that case prohibited not the video games but the underlying conduct of a sweepstakes whose outcome was announced through the video game. *Id.* at 297, 749 S.E.2d at 435. Unlike the statute in *Hest,* however, the statute here defines a "commercial social networking Web site" as one that facilitates social introduction between people, N.C.G.S. § 14-202.5(b)(2), and provides users with a means of communicating with each other, *id.* § 14-202.5(b)(4). As is apparent to any who access them, social networking Web sites provide both a forum for gathering information and a means of communication. Even so, like the statute in *Hest,* the essential purpose of section 14-202.5 is to limit conduct, specifically the ability of registered sex offenders to access certain carefully-defined Web sites. This limitation on conduct only incidentally burdens the ability of registered sex offenders to engage in speech after accessing those Web sites that fall within the statute's reach. Thus we conclude that section 14-202.5 is a regulation of conduct.

Our next inquiry is whether N.C.G.S. § 14-202.5 governs conduct on the basis of the content of speech or is instead a content-neutral regulation. *See Brown v. Town of Cary,* 706 F.3d 294, 300 (4th Cir. 2013) ("Our first task is to determine whether the [statute] 'is content based or content neutral . . . .' ") (quoting *City of Ladue v. Gilleo,* 512 U.S. 43, 59, 114 S. Ct. 2038, 2047, 129 L. Ed. 2d 36, 50 (1994) (O'Connor, J., concurring)). The level of scrutiny we apply is based on this determination. Restrictions based upon the content of the speech trigger strict scrutiny, *see United*

States v. Playboy Entm't Grp., 529 U.S. 803, 814, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865, 880 (2000), and are "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542, 120 L. Ed. 2d 305, 317 (1992) (citations omitted). To survive under strict scrutiny, the regulation "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, __ U.S. __, __, 134 S. Ct. 2518, 2530, 189 L. Ed. 2d 502, 515 (2014) (citation omitted). In contrast, content-neutral regulations of conduct that impose an incidental burden on speech are subject to intermediate scrutiny because they "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459, 129 L. Ed. 2d 497, 517 (1994).

The United States Supreme Court recently discussed the distinction between content-based and content-neutral regulations in *Reed v. Town of Gilbert*, __ U.S. __, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Under *Reed*, a court initially must consider "whether the law is content neutral on its face." *Id.* at __, 135 S. Ct. at 2228, 192 L. Ed. 2d at 246. Although *Reed* focused on the interpretation of content-based regulations of *speech*, while we concluded above that section 14-202.5 is a regulation of *conduct*, even under a *Reed* analysis we see that section 14-202.5 is a content-neutral regulation. On its face, this statute imposes a ban on accessing certain defined commercial social networking Web sites without regard to any content or message conveyed on those sites. The limitations imposed by the statute are based not upon speech contained in or posted on a site, but instead focus on whether functions of a particular Web site are

available for use by minors. Thus, we conclude, as the Court did in *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661, 675 (1989), that section 14-202.5 "involve[s] a facially content-*neutral* ban on the use [of commercial social networking Web sites]." *Reed*, __ U.S. at __, 135 S. Ct. at 2228, 192 L. Ed. 2d at 247 (citing *Ward*, 491 U.S. at 792, 109 S. Ct. at 2754, 105 L. Ed. 2d at 676).

As to the intent of the General Assembly in passing section 14-202.5, the trial court found as a matter of law that the purpose of the statute is to "facilitate the legitimate and important aim of the protection of minors from sex offenders who are registered in accordance with Chapter 14, Article 27A of the General Statutes." The parties have not challenged this conclusion of law. *Reed* states that a law, though content neutral on its face, is "considered [a] content-based regulation[] of speech" if the law "cannot be 'justified without reference to the content of the regulated speech' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.* at __, 135 S. Ct. at 2227, 192 L. Ed. 2d at 245 (fourth alteration in original) (quoting *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754, 105 L. Ed. 2d at 675). A court must address both prongs before concluding that a lower level of scrutiny applies to the law. *Id.* at __, 135 S. Ct. at 2228, 192 L. Ed. 2d at 247. Assuming that these tests also apply to a regulation of conduct, we see that section 14-202.5 satisfies both. The justification of the statute—protecting minors from registered sex offenders—is unrelated to any speech on a regulated site. Nor does the statute have anything to say regarding the content of any speech on a regulated site. As a result, we conclude that, to the

extent *Reed* applies to our analysis of section 14-202.5, the statute satisfies that case's requirements and strict scrutiny is not required. Although the statute may impose an incidental burden on the ability of registered sex offenders to engage in speech on the Internet, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754, 105 L. Ed. 2d at 675 (citation omitted). Accordingly, we conclude that N.C.G.S. § 14-202.5 is a content-neutral regulation requiring intermediate scrutiny.

"Articulations of intermediate scrutiny vary depending on context, but tend to require an important or substantial government interest, a direct relationship between the regulation and the interest, and regulation no more restrictive than necessary to achieve that interest." *Hest*, 366 N.C. at 298, 749 S.E.2d at 436 (citation omitted). The Supreme Court has provided guidance in applying intermediate scrutiny. In *United States v. O'Brien*, the defendant claimed that the statute forbidding destruction of his Selective Service registration card was unconstitutional as applied to him because such a ban on burning the card violated his right to free speech. 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). The Supreme Court found that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," *id.* at 376, 88 S. Ct. at 1678, 20 L. Ed. 2d at 679, the regulation

> is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it

> furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,

id. at 377, 88 S. Ct. at 1679, 20 L. Ed.2 d at 680. Because the statute at issue here is a content-neutral regulation that imposes only an incidental burden on speech, we believe the four-factor test from *O'Brien* is instructive in evaluating defendant's facial attack on N.C.G.S. § 14-202.5.

Looking to the first two *O'Brien* factors, the parties agree that promulgating restrictions such as those contained in N.C.G.S. § 14-202.5 on registered sex offenders is within the constitutional power of the General Assembly and that protecting children from sexual abuse is a substantial governmental interest. We then consider *O'Brien* 's third factor, whether this governmental interest is related to the suppression of free expression. The State asserts that the statute was enacted to prevent registered sex offenders from prowling on social media and gathering information about potential child targets. Viewing this statute as a preventive measure apparently intended to forestall illicit lurking and contact, we see that it is distinguishable from other North Carolina statutes that criminalize communications which have already occurred. The interest reflected in the statute at bar, which protects children from convicted sex offenders who could harvest information to facilitate contact with potential victims, is unrelated to the suppression

of free speech. Accordingly, the statute satisfies *O'Brien*'s third factor.

Although the fourth *O'Brien* factor appears to reflect the strict scrutiny requirement that the regulation be the "least restrictive means" of carrying out a compelling state interest, *McCullen*, __ U.S. at __, 134 S. Ct. at 2530, 189 L. Ed. 2d at 515, the United States Supreme Court has since explained that for content-neutral regulations, the statute should be "narrowly tailored to serve a significant governmental interest," *Ward*, 491 U.S. at 796, 109 S. Ct. at 2756, 105 L. Ed. 2d at 678 (quoting *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221, 227 (1984)) (finding that a narrowly tailored regulation controlling noise does not restrict free speech). Narrow tailoring requires the government to demonstrate that "alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, __ U.S. at __, 134 S. Ct. at 2540, 189 L. Ed. 2d at 526.

Defendant argues that the statute is not narrowly tailored. Specifically, defendant contends that the statute's definition of a "commercial social networking Web site" is overbroad, that the statute does not take into account the underlying offense of conviction or the likelihood of recidivism, that the statute does not require criminal intent, that the statute is underinclusive because, *inter alia*, it applies only to commercial Web sites, that less burdensome laws already exist to protect children from baleful Internet contacts, and that sufficient alternatives allowing communication do not exist. Defendant's arguments

are premised on the assumption that a statute regulating the manner of speech must be drawn as narrowly as possible, or at least more narrowly than this statute. However, the Supreme Court has stated explicitly that "[l]est any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798, 109 S. Ct. at 2757-58, 105 L. Ed. 2d at 680. The Court went on to explain that "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800, 109 S. Ct. at 2758, 105 L. Ed. 2d at 681.

Instead of imposing a blanket prohibition against Internet use, the statute establishes four specific criteria that must be met in order for a commercial social networking Web site to be prohibited. N.C.G.S. § 14-202.5(b). In addition, the statute entirely exempts Web sites that are exclusively devoted to speech, such as instant messaging services and chat rooms. *Id.* § 14-202.5(c). Thus we see that the General Assembly has carefully tailored the statute in such a way as to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors, thereby addressing the evil that the statute seeks to prevent. While we acknowledge that defendant has identified some areas in which the statute could have been drafted even

more narrowly, we conclude that the statute is sufficiently narrowly drawn to satisfy the requirements of *Ward*.

Our inquiry does not end here, however. A content-neutral statute not only must be narrowly tailored but must also "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791, 109 S. Ct. at 2753, 105 L. Ed. 2d at 675 (quoting *Cmty. for Creative Non–Violence*, 468 U.S. at 293, 104 S. Ct. at 3069, 82 L. Ed. 2d at 227). Subsection 14-202.5(c) allows such alternatives through specific exceptions for Web sites that provide discrete e-mail, chat room, photo-sharing, and instant messaging services. A Web site that requires one seeking access to provide no more than a username and an email address to reach the page does not necessarily violate the statute. Only a site that generates or creates a Web page or a personal profile for the user and otherwise meets the requirements of the statute is prohibited. In addition, even if a site falls within the definition of a "commercial social networking Web site" found in subsection 14-202.5(b), in order to convict a registered sex offender of accessing the site, the State must prove that "the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site." N.C.G.S. § 14-202.5(a).

In his brief and argument to this Court, defendant lists numerous well-known Web sites that he contends he could not access legally. In considering those and other similar sites, we find that even where defendant is correct, the Web offers numerous alternatives that provide the same or similar services that defendant

could access without violating N.C.G.S. § 14-202.5. For example, defendant would not violate N.C.G.S. § 14-202.5 by accessing the Paula Deen Network, a commercial social networking Web site that allows registered users to swap recipes and discuss cooking techniques, because its Terms of Service require users to be at least eighteen years old to maintain a profile. *Paula Deen Network Terms of Service,* http://www.pauladeen.com/terms-of-service/ (last visited 5 November 2015) ("This website is designed for and targeted to Adults. It is intended solely and exclusively for those at least 18 years of age or older."). Similarly, users may follow current events on WRAL.com, which requires users to be at least eighteen years old to register with the site and, as a result, is not prohibited. *Capitol Broadcasting Company Terms of Use,* http://www.capitolbroadcasting.com/terms-of-use/ (last visited 5 November 2015) ("[Y]ou must be at least 18 years old to register and to use the Services."). A sex offender engaging in an on-line job search is free to use the commercial social networking Web site Glassdoor.com, which prohibits use by individuals under the age of eighteen. *Glassdoor Terms of Use,* http://www.glassdoor.com/about/terms.htm (last visited 5 November 2015) ("To access or use Glassdoor, you must be 18 years of age or older. . . ."). Finally, sex offenders permissibly may access Shutterfly to share photos, because that site limits its users to those eighteen and older. *Shutterfly Terms of Use,* http://shutterfly-inc.com/terms.html (last visited 5 November 2015) ("In order to create a member account with any of our Sites and Apps, you must be at least 18 years of age.").

While we leave for another day the question whether a site's terms of use alone are sufficient as a matter of law to impute knowledge of the site's limitations on access to a registrant, such terms of use provide specific and pertinent information to a registered sex offender seeking lawful access to the Internet. These examples demonstrate that the Web offers registered sex offenders myriad sites that do not run afoul of the statute. In addition, such methods of communication as text messages, FaceTime, electronic mail, traditional mail, and phone calls, which are not based on use of a Web site, are unrestricted. Accordingly, the regulation leaves open ample channels of communication that registered sex offenders may freely access.

Defendant cites cases from other jurisdictions faulting similar statutes. However, those cases are not binding on this Court, and the statutes under consideration in those cases are readily distinguishable from our own. For instance, a federal circuit court found unconstitutional an Indiana statute that sought to prevent most sex offenders from communicating with minors by prohibiting their use of commercial social networking Web sites, including instant messaging services and chat rooms. *See Doe v. Prosecutor, Marion Cty.*, 705 F.3d 694, 695–96 (7th Cir. 2013).The circuit court found that the law was not narrowly tailored to prevent illicit communications between sex offenders and minors. *Id.* at 695. Not only did the Indiana statute prohibit use of instant messaging and chat room services, both of which are exempted under N.C.G.S. § 14-202.5, Indiana's statute focused on preventing communications, while North Carolina's statute focuses on preventing registered sex offenders

from gathering information about minors on the Internet. Similarly, while a federal court concluded that Louisiana's statute, which was analogous to Indiana's, was facially unconstitutional because it was vague and overbroad, *Doe v. Jindal,* 853 F. Supp. 2d 596, 607 (M.D. La. 2012), Louisiana thereafter amended that statute to a version more in line with N.C.G.S. § 14-202.5, *see* La. Rev. Stat. Ann. 14:91.5 (2012), available at http://legis.la.gov/Legis/Law.aspx?d=78714.

Thus, we conclude that N.C.G.S. § 14-202.5 satisfies *O'Brien*'s four factors, is narrowly tailored to serve a substantial governmental interest, and leaves available ample alternative channels of communication. Defendant has failed to meet the high bar necessary to mount a successful facial challenge. *See, e.g., Thompson,* 349 N.C. at 496, 508 S.E.2d at 285 (holding defendant's facial challenge to a statute regulating pretrial release failed when defendant did not establish that no set of circumstances existed under which the act would not be valid). Accordingly, we conclude the statute is constitutional on its face.

We next consider defendant's as-applied challenge. A statute that is constitutional on its face nevertheless may be unconstitutional as applied to a particular defendant. Because Facebook does not limit users to those over the age of eighteen and otherwise fits the definition of a commercial social networking Web site set out in N.C.G.S. § 14-202.5, defendant is forbidden to access that site unless the statute is unconstitutional as applied to him. Earlier in this opinion we observed that the trial court made the uncontested finding that the government's interest here is

protecting minors by preventing registered sex offenders from gathering information about them on social media. Although we also found that the statute is content-neutral, we observed that it imposes an incidental burden on speech on the Internet. We now consider whether this incidental restriction on defendant is no greater than is essential to further the government's interest. *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679, 20 L. Ed. 2d at 680.

Beginning with consideration of the nature and severity of the incidental restriction, we have stated that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes." *Hest*, 366 N.C. at 298, 749 S.E.2d at 436 (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 1595, 104 L. Ed. 2d 18, 25 (1989)). The United States Fourth Circuit Court of Appeals has held that, in the context of responding to a posting on a political campaign page maintained on Facebook.com, simply "liking" the post is speech protected by the First Amendment, an analysis with which we agree. *See Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) ("[C]licking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement."). Here, defendant posted the following on Facebook: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? . . . Praise be to GOD, WOW! Thanks JESUS!" If merely "liking" a post on Facebook.com is speech protected by the First Amendment, we have no doubt that posting a message on that site falls within this category as well. Thus, the statutory restrictions on defendant's right to speech on Facebook, while incidental, are not trivial.

Considering next the governmental interest in protecting minors, when "a direct relationship between the regulation and the interest" exists, *Hest*, 366 N.C. at 298, 749 S.E.2d at 436, an incidental burden on speech can be justified if the governmental interest is being furthered, *see Turner Broad. Sys.*, 512 U.S. at 662, 114 S. Ct. at 2469, 129 L. Ed. 2d at 530. Nevertheless, "[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' " *Id.* at 664, 114 S. Ct. at 2470, 129 L. Ed. 2d at 531 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1995)). Instead, the State must demonstrate "that the regulation will in fact alleviate these harms in a direct and material way." *Id.* (citations omitted). The State argues that protection of minors from known sexual predators is a vital duty, one this Court has recognized in another context. *See Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008) (discussing the risk of recidivism among sex offenders).

In considering this balance between the governmental interest and the incidental burden on this defendant's speech, we are mindful of our opinion in *Britt v. State*, in which we were confronted with a challenge to the constitutionality of N.C.G.S. § 14-415.1, which banned all convicted felons from possessing firearms. 363 N.C. 546, 681 S.E.2d 320 (2009). We held that the statute violated the North Carolina Constitution when applied to the plaintiff because his underlying offense (a nonviolent drug crime), his subsequent lawful behavior and demonstrated respect for the law, and his history of

peaceable conduct following his conviction, all gave no indication that he posed any substantial threat to society. *Id.* at 550, 681 S.E.2d at 323. As a result, we concluded that the statute barring the plaintiff from possessing a firearm was "not fairly related" to the governmental purpose for which the statute was enacted, which was "the preservation of public peace and safety." *Id.* The statute was unconstitutional as applied to the plaintiff when prosecution would not further that governmental interest.

As indicated by our analysis in *Britt,* the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case. In ascertaining whether the government's interest in protecting children from registered sex offenders who are lurking on social networking Web sites and gleaning information on potential targets is furthered by prosecution of this defendant, we observe that defendant has the status of a registered sex offender because he was convicted of indecent liberties with a minor, a sex crime against a child falling directly within the purview of section 14-202.5. Officers who searched his home found a signed written notice advising defendant of sites he could not legally access. Defendant set up his Facebook page under an alias, further indicating his awareness that he was indulging in forbidden behavior while simultaneously hiding his identity from investigators and parents. Thus defendant's case is readily distinguishable from *Britt,* in which the plaintiff's underlying conviction for drugs was considerably less directly related to the possession of "sporting rifles and shotguns" than is defendant's indecent liberties conviction to his use of Internet sites frequented by

minors. Moreover, the plaintiff in *Britt* discussed the law's application to him with his local sheriff and thereafter voluntarily divested himself of all firearms before instituting his constitutional challenge to the statute, while defendant here deliberately disguised his identity. *Id.* at 547-48, 681 S.E.2d at 321-22. Unlike the plaintiff in *Britt*, defendant neither demonstrated respect for the law nor made good faith efforts to comply with the statute. These facts satisfy us that the incidental burden imposed upon this defendant, who is barred from Facebook.com but not from many other sites, is not greater than necessary to further the governmental interest of protecting children from registered sex offenders. Thus, N.C.G.S. § 14-202.5 is not an unreasonable regulation and is constitutional as applied to defendant. *Cf. id.* at 550, 681 S.E.2d at 323.

Defendant also argues that N.C.G.S. § 14-202.5 is unconstitutionally overbroad. "In the First Amendment context, . . . this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' " *United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435, 447 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 1190 n.6, 170 L. Ed. 2d 151, 160 n.6 (2008)). In *Broadrick v. Oklahoma*, the Court clarified the limited scope of the overbreadth doctrine, explaining that

> the plain import of our cases is, at the very least, that facial overbreadth adjudication is an

> exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

413 U.S. 601, 615, 93 S. Ct. 2908, 2917-18, 37 L. Ed. 2d 830, 842 (1973). Because the notion of striking a statute at the request of one to whom it otherwise unquestionably applies goes against the grain of "prudential limitations on constitutional adjudication," *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 3360, 73 L. Ed. 2d 1113, 1130 (1982), the Supreme Court of the United States has recognized that the doctrine is "strong medicine" to be administered only with caution and as a "last resort," *id.* at 769, 102 S. Ct. at 3361, 73 L. Ed. 2d at 1130 (quoting *Broadrick*, 413 U.S. at 613, 93 S. Ct. at 2916, 37 L. Ed. 2d at 841). A party raising such a challenge "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S. Ct. 2191, 2198, 156 L. Ed. 2d 148, 159 (2003) (alteration in

original) (quoting *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14, 108 S. Ct. 2225, 2234, 101 L. Ed. 2d 1, 17 (1988)). When a statute's infringement on speech protected under the First Amendment is marginal, a finding of facial invalidity is inappropriate if the "remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct." *Ferber*, 458 U.S. at 770 n.25, 102 S. Ct. at 3362 n.25, 73 L. Ed. 2d at 1131 n.25 (alterations in original) (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580-81, 93 S. Ct. 2880, 2898, 37 L. Ed. 2d 796, 817 (1973)).

In an overbreadth analysis, the reviewing court must "construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650, 662 (2008). As detailed above in our analysis of the facial constitutionality of the statute, we see that the statute is drafted carefully to limit its reach by establishing four specific criteria that must be met before access to a commercial social networking Web site is prohibited to a registered sex offender, N.C.G.S. § 14-202.5(b); that the statute exempts sites that are exclusively devoted to speech, *id.* § 14-202.5(c); and that the statute requires the State to prove that a registered sex offender knew the site permitted minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site, *id.* § 14-202.5(a). These factors ensure that registered sex offenders are prohibited from accessing only those Web sites where they could actually gather information about minors to target. Outside these limits, registered sex offenders are free to use the Internet.

Although this statute "may deter protected speech to some unknown extent," *Broadrick*, 413 U.S. at 615, 93 S.C t. at 2917, 37 L.Ed.2d at 842, that effect can be characterized "at best [as] a prediction," *id.*, 93 S.Ct. at 2917-18, 37 L. Ed. 2d at 842, and we "cannot, with confidence, justify invalidating [this] statute on its face," *id.* at 615, 93 S. Ct. at 2918, 37 L. Ed. 2d at 842, and prohibit the State from continuing to enforce a statute protecting such an important government interest, *id.* Given the reluctance with which courts administer the strong medicine of overbreadth, we conclude section 14-202.5 does not sweep too broadly in preventing registered sex offenders from accessing carefully delineated Web sites where vulnerable youthful users may congregate. As in *Broadrick*, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 615-16, 93 S. Ct. at 2918, 37 L. Ed. 2d at 842.

Finally, the State challenges the Court of Appeals holding that the statute is unconstitutionally vague. Laws that are not "clearly defined" are void for vagueness under the Due Process Clause. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222, 227 (1972). Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," *id.* at 108, 92 S. Ct. at 2298-99, 33 L. Ed. 2d at 227, and must also provide sufficient clarity to prevent arbitrary and discriminatory enforcement, *see Petersilie*, 334 N.C. at 182, 432 S.E.2d at 839; *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Vague laws chill free speech because "[u]ncertain meanings

inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.' " *Grayned,* 408 U.S. at 109, 92 S. Ct. at 2299, 33 L. Ed. 2d at 228 (second alteration in original) (quoting *Baggett v. Bullitt,* 377 U.S. 360, 372, 84 S. Ct. 1316, 1323, 12 L. Ed. 2d 377, 385 (1964)).

Vagueness cannot be raised by a defendant whose conduct falls squarely within the scope of the statute. *See Parker v. Levy,* 417 U.S. 733, 756, 94 S. Ct. 2547, 2562, 41 L. Ed. 2d 439, 458 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); *see also Hoffman Estates,* 455 U.S. at 495, 102 S. Ct. at 1191, 71 L. Ed. 2d at 369 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."). The Court of Appeals "assume[d] that persons of ordinary intelligence would likely interpret the statute as prohibiting access to mainstream commercial social networking sites such as *Facebook.com.*" *Packingham,* __ N.C.App. at __, 748 S.E.2d at 153. Whatever the status of other Web sites, no party disputes that Facebook.com, the site at issue here, falls under N.C.G.S. § 14-202.5's definition of "commercial social networking Web site." While an argument may be made that the statutory term "access" could be vague in other contexts, defendant's logging into his Facebook account and posting a message on his page is unquestionably "accessing" Facebook.com. Defendant's conduct defeats his vagueness claim.

Accordingly, we reverse the opinion of the Court of Appeals.

REVERSED.

Justice ERVIN did not participate in the consideration or decision of this case.

Justice HUDSON dissenting.

The majority concludes that N.C.G.S. § 14-202.5 (2013), which bars any registered sex offender from accessing any commercial social networking site on which he knows a minor can create or maintain a profile, is constitutional on its face and as applied to defendant. Because I conclude that the statute is unconstitutional on its face, I disagree with the majority's reversal of the Court of Appeals. More specifically, I conclude that section 14-202.5 is not narrowly tailored enough to withstand even intermediate scrutiny and that it is facially overbroad under the First Amendment. Accordingly, I respectfully dissent.

As an initial matter, I agree with the majority opinion to the extent it concludes that N.C.G.S. § 14-202.5, by proscribing access to commercial social networking sites, targets sites which are used for "gathering information and [as] means of communication." However, I do not agree with the later assertion that the statute primarily regulates conduct and places only an "incidental" burden on speech. This statute completely bars registered sex offenders from communicating with others through many widely utilized commercial networking sites. Therefore, in my view, it primarily targets expressive activity usually protected by the First Amendment. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997) (observing that previous cases from that Court "provide no basis for qualifying the level of First

Amendment scrutiny that should be applied" to online activities); *see also Brown v. Entm't Merchs. Ass'n*, __ U.S. __, __, 131 S. Ct. 2729, 2733 (2011) ("And whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." (citation and internal quotation marks omitted)).

The majority finds the "four-factor test from [*United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968)] instructive" in applying intermediate scrutiny to what it sees as an "incidental" burden on speech. *O'Brien* involved a regulatory ban on burning of a draft card, which the Court saw as conduct having a "communicative element." *Id.* at 376, 88 S. Ct. at 1678. Because I read *O'Brien* to apply only where the restriction primarily targets expressive conduct, and because the statute at issue here necessarily burdens speech directly, I would not apply *O'Brien's* four-factor test here. *See id.*, 88 S. Ct. at 1678-79 ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). Instead, I would analyze this statute as one that, by design and in effect, primarily and directly regulates First Amendment-protected activity, not conduct.

Because this statute primarily regulates speech (and other protected activity), I would apply the scrutiny applicable to restrictions on speech. *See, e.g.*, *McCullen v. Coakley*, __ U.S. __, __, 134 S. Ct. 2518,

2530 (2014); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–28, 130 S. Ct. 2705, 2723–24 (2010). According to these cases, the next step would be to determine whether the statute is content-based or content-neutral. Content-based restrictions are "presumptively unconstitutional" and can stand only if they survive strict scrutiny, the most difficult test in federal constitutional law. *McCullen*, __ [sic] at __, 134 S. Ct. at 2530. In contrast, content-neutral measures that burden speech are subject to a form of intermediate scrutiny—a still difficult but less exacting analysis. *See id.* at __, 134 S. Ct. at 2530.

Here, applying the United States Supreme Court's recent decision in *Reed v. Town of Gilbert*, __ U.S. __, 135 S. Ct. 2218 (2015), the majority concludes that N.C.G.S. § 14-202.5 is a content-neutral burden on conduct only incidentally affecting speech. While I think there is a strong argument in light of *Reed* that the statute is content-based because it prohibits registered sex offenders from accessing some websites, but not others, based on the content that appears on the sites, I do not think we need to resolve this question because I conclude that the law cannot withstand even intermediate scrutiny.

The intermediate scrutiny standard applicable to content-neutral regulations on speech requires the government to demonstrate, *inter alia*, that the restriction is "narrowly tailored to serve a significant governmental interest." *McCullen*, __ U.S. at __, 134 S. Ct. at 2534 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796, 109 S. Ct. 2746, 2756 (1989)). More specifically,

> [f]or a content-neutral time, place, or manner regulation to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate [and significant] interests. Such a regulation, unlike a content-based restriction of speech, need not be the least restrictive or least intrusive means of serving the government's interests. But the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Id. at __, 134 S. Ct. at 2535 (citations and internal quotation marks omitted). In short, when a statute "burden[s] substantially more speech than necessary to achieve the [government's] asserted interests," it will fail this form of intermediate scrutiny. *Id.* at __, 134 S. Ct. at 2537. Here, there is no dispute that the State's purported concern—protecting minors from exploitation by registered sex offenders using the Internet—qualifies as a legitimate and significant government interest. The central question, then, is whether section 14-202.5 "burden[s] substantially more speech than necessary" in support of that interest. *Id.* at __, 134 S. Ct. at 2537.

I conclude that it does. First, the statute as written sweeps too broadly regarding who is subject to its prohibitions. As noted, the State's interest here is in protecting minors from registered sex offenders using the Internet. However, this statute applies to *all* registered offenders. *See* § 14-202.5(a) ("It is unlawful for a [registered] sex offender... to access a commercial social networking Web site where the sex offender

knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site."). The statute is not restricted in application only to those whose offenses harmed a minor or in some way involved a computer or the Internet, nor to those who have been shown to be particularly violent, dangerous, or likely to reoffend. This statute therefore groups together, without distinction, offenders whose history and past conduct directly implicate the State's concerns with those who do not. To the extent the statute does so, it "burden[s]... more speech than necessary to achieve the [State's] interests." *McCullen*, __ U.S. at __, 134 S. Ct. at 2537.

Second, as written, the statute also sweeps far too broadly regarding the activity it prohibits. The majority asserts that the statute prohibits "registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors." But in fact, the statute contains no such limitation. Section 14-202.5 defines the term "commercial social networking Web site" as a website that (1) is operated by someone who derives revenue from the site; (2) facilitates "social introduction" or "information exchanges" between two or more people; (3) allows users "to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, [or] other personal information about the user... that may be accessed by other users or visitors" to the site; and (4) provides "users or visitors mechanisms to communicate with other users." N.C.G.S. § 14-202.5(b). I note in particular that the statute's description of a "personal

profile [ ]," and the language "such as" when referring to the information that can appear in such profiles, could bring within the statute's scope many websites that allow users to register by going through the minimal process of creating a username and adding an email address or telephone number. As a result, this definition clearly includes sites that are normally thought of as "social networking" sites, like Facebook, Google+, LinkedIn, Instagram, Reddit, and MySpace. However, the statute also likely includes sites like Foodnetwork.com, and even news sites like the websites for *The New York Times* and North Carolina's own *News & Observer*. *See The News & Observer Terms of Service*, http://www.newsobserver.com/customer-service/terms-of-service/ (last visited Oct. 22, 2015) (stating that "[i]f you are under eighteen (18) then you may only use NewsObserver.com with the consent of a parent or legal guardian" but not limiting registration on the site to adults). Most strikingly, the statute may even bar all registered offenders from visiting the sites of Internet giants like Amazon[1] and Google.

In short, however legitimate–even compelling–the State's interest in protecting children might be, the plausible sweep of the statute as currently written

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[1] The statute does except from this definition any website that "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services *between its members or visitors*." N.C.G.S. §14-202.5(c)(2) (emphasis added). However, as defendant argues, "Amazon's primary purpose is to facilitate transactions *between Amazon itself and its visitors*, not between users of the Web site and other users." (Emphasis added.) Accordingly, it appears that this exception does not actually apply to websites like Amazon, but only covers websites like Craigslist or eBay.

"create[s] a criminal prohibition of alarming breadth," *United States v. Stevens*, 559 U.S. 460, 474, 130 S. Ct. 1577, 1588 (2010), and extends well beyond the evils the State seeks to combat. I therefore conclude that N.C.G.S. § 14-202.5 "burden[s] substantially more speech than necessary to achieve the [State's legitimate] interests," *McCullen*, __ U.S. at __, 134 S. Ct. at 2537, and cannot survive even the intermediate scrutiny applied to content-neutral restrictions on speech.

In addition, for similar reasons, I conclude that this statute is also facially overbroad under the First Amendment. The overbreadth inquiry is very similar to the "narrow-tailoring" inquiry described above: First Amendment overbreadth doctrine requires a court to invalidate a statute that "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830, 1838 (2008). There is, however, one important nuance. Namely, while the Supreme Court of the United States has often invalidated specific applications of statutes under as-applied challenges, *see, e.g., McCullen*, __ U.S. at __, 134 S. Ct. at 2528, 2541, that Court has also made clear that First Amendment doctrine specifically permits litigants to make facial challenges based on overbreadth, *see, e.g., Stevens*, 559 U.S. at 473, 130 S. Ct. at 1587 ("In the First Amendment context, however, this Court recognizes a second type of *facial* challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." (emphasis added) (citation and internal quotation marks omitted)); *Williams*, 553 U.S. at 292, 128 S. Ct. at 1838 ("According to our First

Amendment overbreadth doctrine, a statute is *facially invalid* if it prohibits a substantial amount of protected speech." (emphasis added). The Court has even noted that such a challenge is permitted when the challenger's own conduct would clearly fall within the scope of the statute's prohibition and the claim is based only on how that statute might apply to the activity of others. *See, e.g., Humanitarian Law Project*, 561 U.S. at 20, 130 S. Ct. at 2719 ("[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others. [But s]uch a plaintiff may have a valid overbreadth claim under the First Amendment. . . ."). In light of this precedent permitting such challenges, and for the reasons noted above, I would hold that the statute at issue here, N.C.G.S. § 14-202.5, is facially overbroad and therefore unconstitutional, regardless of its application in this specific case.

For the foregoing reasons, I conclude that N.C.G.S. § 14-202.5 is both insufficiently narrowly tailored to satisfy intermediate scrutiny and facially overbroad under the First Amendment. Because I disagree with the majority's conclusions to the contrary, I respectfully dissent.

Justice BEASLEY joins in this opinion.

No. COA12-1287

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

STATE OF NORTH
CAROLINA

v.

Durham County

No. 10 CRS 57148
LESTER GERARD
PACKINGHAM

Appeal by defendant from judgment entered 30 May 2012 by Judge William Osmond Smith in Durham County Superior Court. Heard in the Court of Appeals 23 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Glenn Gerding, for defendant.

ELMORE, Judge.

Lester Gerard Packingham (defendant), a registered sex offender, appeals from a judgment entered upon a jury conviction for accessing a commercial social networking Web site, pursuant to N.C. Gen. Stat. § 14-202.5 (2011). Defendant

challenges the statute as unconstitutional. For the reasons stated herein, we agree. Accordingly, we vacate the judgment of the trial court.

I. Background

Chapter 14, Article 27A of our general statutes governs the Sex Offender and Public Protection Registration Programs (the Registry). "The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." N.C. Gen. Stat § 14-208.5 (2011). Accordingly, the stated purpose of the Registry is to protect the public and children from the risk of recidivism by sex offenders and to aid "law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders" because sex offenders "pose significant and unacceptable threats to the public safety and welfare of children." *Id.*

As part of the Registry, persons convicted on or after 1 January 1996 of sexually violent offenses or certain offenses against minors must register as a sex offender. In doing so, they must provide the sheriff's office in the county in which they reside with all pertinent personal information set forth in N.C. Gen. Stat. § 14-208.7(b) (2011). "Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14.208.12A." N.C. Gen. Stat. § 14-208.7(a) (2) (2011). Alternatively, "[a]ny

person who is a recidivist, who commits an aggravated offense, or who is determined to be a sexually violent predator" is required to register under the Sexually Violent Predator Registration Program. N.C. Gen. Stat. § 14-208.6A (2011). A violation of the registration requirements is a Class F felony. N.C. Gen. Stat. § 14-208.11 (2011).

On 1 December 2008, the General Assembly enacted N.C. Gen. Stat. § 14-202.5 as part of the Protect Children from Sexual Predators Act. NC B. Summ., 2008 Reg. Sess. S.B. 132. The statute bans the use of commercial social networking Web sites by any registered sex offender:

> (a) Offense. -- It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.
>
> (b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:
>
> (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
>
> (2) Facilitates the social introduction between two or more persons for the purpose of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

(d) Jurisdiction. -- The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

> (e) Punishment. -- A violation of this section is a Class I felony.

N.C. Gen. Stat. § 14-202.5 (2011).

In the case *sub judice,* defendant was convicted of taking indecent liberties with a child in 2002. Accordingly, he became a registered sex offender. In 2010, in an effort to enforce N.C. Gen. Stat. § 14-202.5, the Durham Police Department began investigating profiles on the Web sites Myspace.com and Facebook.com for evidence of use by registered sex offenders. An officer recognized defendant in a profile picture belonging to Facebook user "J.R. Gerard," then confirmed that defendant was the person who created the profile page. Thereafter, defendant was indicted on 20 September 2012 for maintaining at least one personal Web page or profile on Facebook.com in violation of N.C. Gen. Stat. § 14-202.5.

At a pretrial hearing, defendant moved to dismiss the charge on the basis that N.C. Gen. Stat. § 14-202.5 was unconstitutional. The trial court joined defendant's motion with a similar motion made by another defendant. Superior Court Judge Michael R. Morgan denied the joint motion, finding that the statute was constitutional as applied to both defendants. He declined to rule on the statute's facial constitutionality for want of jurisdiction. Defendant in the case *sub judice,* and the other defendant, filed a joint appeal with this Court, which we denied on 22 June 2011.

On 30 May 2012, a jury found defendant guilty of accessing a commercial social networking Web site.

Defendant was sentenced to 6 to 8 months imprisonment, suspended, and placed on 12 months of supervised probation. Defendant now appeals.

II. Analysis

On appeal, defendant challenges N.C. Gen. Stat. § 14-202.5 (2011) on the basis that it violates his federal and state constitutional rights to free speech, expression, association, assembly, and the press under the First and Fourteenth Amendments. Additionally, he asserts that the statute is overbroad, vague, and not narrowly tailored to achieve a legitimate government interest. We agree.

This case presents the single legal question of whether N.C. Gen. Stat. § 14-202.5 is unconstitutional. "The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act." *State v. Daniels*, __ N.C.App. __, __, 741 S.E.2d 354, 363 (2012), *appeal dismissed, review denied*, 738 S.E.2d 389 (N.C.2013) (internal quotations and citations omitted).

A. Level of Scrutiny

The statute plainly involves defendant's First Amendment rights as incorporated through the Fourteenth Amendment because it bans the freedom of speech and association via social media. "[A] statute regulating the time, place and manner of expressive activity is content-neutral in that it does not forbid communication of a specific idea." *State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840

(1993) (quotation marks and citations omitted). N.C. Gen. Stat. § 14-202.5 (2011) is content neutral because it restricts access to commercial social networking Web sites without any reference to the content or type of speech disseminated or posted thereon. *See Turner Broad. Sys. v. FCC,* 512 U.S. 622, 641-42, 129 L.Ed.2d 497 (1994). Content-neutral regulations are subject to intermediate scrutiny: they must be both "narrowly tailored to achieve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 105 L.Ed.2d 661, 675 (1989). In the instant case, we conclude that the statute is not narrowly tailored; accordingly, we decline to address whether the statute leaves open alternative channels for communication. *See Doe v. Prosecutor,* 705 F.3d 694, 698 (7th Cir. 2013).

B. Narrow Tailoring

The U.S. Supreme Court has stated that a narrowly tailored statute "targets and eliminates no more than the exact source of the evil it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz,* 487 U.S. 474, 485, 101 L.Ed.2d 420, 485 (1988) (citation omitted).

> [T]he requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. . . . So long as the means chosen are not substantially broader than necessary to

> achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Ward, 491 U.S. at 799-800, 105 L.Ed.2d at 680-81 (quotation marks and citations omitted). The State must also "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys.*, 512 U.S. at 664, 129 L.Ed.2d at 532.

At the outset, we note that this is the first constitutional challenge to N.C. Gen. Stat. § 14-202.5 heard before this Court. As such, we find several federal court decisions addressing the constitutionality of similar statutes to be persuasive. Most recently, in *Doe v. Prosecutor*, 705 F.3d 694 (7th Cir. 2013), the Seventh Circuit declared Indiana Code § 35-42-4-12 (2011) to be unconstitutional: the statute prohibited registered sex offenders convicted of offenses involving a minor (including, *inter alia*, child molesting, possession of child pornography, and sexual conduct in the presence of a minor) from using social networking websites, instant messaging services, and chat programs. It defined a "social networking web site" as a Web site that:

> (1) facilitates the social introduction between two (2) or more persons;

> (2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members;
>
> (3) allows a member to create a web page or a personal profile; and
>
> (4) provides a member with the opportunity to communicate with another person.
>
> The term does not include an electronic mail program or message board program.

Ind. Code Ann. § 35-42-4-12 (2011). Additionally, the statute provided a defense to a prosecution if the registered offender:

> (1) did not know that the web site or program allowed a person who is less than eighteen (18) years of age to access or use the web site or program; and
>
> (2) upon discovering that the web site or program allows a person who is less than eighteen (18) years of age to access or use the web site or program, immediately ceased further use or access of the web site or program.

Id. Calling the statute "overinclusive" and a complete "social media ban," the Seventh Circuit concluded that, though content neutral, the statute was not narrowly tailored to serve the state's interest because it broadly prohibited substantial protected speech rather than specifically targeting the evil of improper communications to minors:

> [T]here is nothing dangerous about Doe's use of social media as long as he does not improperly

> communicate with minors. Further, there is no disagreement that illicit communication comprises a minuscule subset of the universe of social network activity. As such, the Indiana law targets substantially more activity than the evil it seeks to redress.

Prosecutor, 705 F.3d at 698-99.

Similarly, Nebraska statute Neb.Rev.Stat. § 28-322.05(1) (2012) made it unlawful for certain registered sex offenders "to knowingly and intentionally use[ ] a social networking web site, instant messaging, or chat room service that allows a person who is less than eighteen years of age to access or use [it]." Neb.Rev.Stat. § 28-322.05(1) (2012). Only those registered offenders convicted of offenses targeting minors were subject to the statutory ban. *See* Neb.Rev.Stat. § 29-4001.01(13) (2012). The statute defined a "social networking web site" as:

> [A] web page or collection of web sites contained on the Internet (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users or visitors to the web site, with or without the creator's permission, consent, invitation, or authorization, and (c) that may permit some form of communication, such as direct comment on the profile page, instant messaging, or email, between the creator of the profile and users who have viewed or accessed the creator's profile[.]

Neb.Rev.Stat. § 29-4001.01(13) (2012).

Upon review, the U.S. District Court in Nebraska held that Neb.Rev.Stat. § 28-322.05 was not narrowly tailored because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Doe v. Nebraska*, 898 F.Supp.2d 1086, 1112 (D. Neb. 2012) (citation omitted) (alteration in original). The District Court reasoned that, even if the ban was applicable only to the most common and notable social networking sites, such as Facebook.com and Myspace.com, it nevertheless prohibited an enormous amount of expressive activity on the internet: "[T]he ban potentially restricts the targeted offenders from communicating with hundreds of millions and perhaps billions of adults and their companies despite the fact that the communication has nothing whatsoever to do with minors." *Id.* at 1111; *see also Doe v. Jindal*, 853 F.Supp.2d 596, 607 (M.D. La. 2012) (holding that La. Rev. Stat. Ann. § 14:91.5 (2012) was unconstitutional, in part because "[t]he sweeping restrictions on the use of the internet for purposes completely unrelated to the activities sought to be banned by the Act impose severe and unwarranted restraints on constitutionally protected speech. More focused restrictions that are narrowly tailored to address the specific conduct sought to be proscribed should be pursued.").

C. Legitimate State Interest

Turning now to the case at hand, it is undisputed that the State has a significant interest in protecting minors from predatory behavior by sex offenders on the internet. North Carolina requires sex offenders to

register in the sex offender database because "the protection of [ ] children is of great governmental interest." N.C. Gen. Stat. § 14-208.5 (2011). However, while enacted to further a legitimate state interest, N.C. Gen. Stat. § 14-202.5, as it stands, is not narrowly tailored.

i. Substantially Broad Application

First, defendant argues that N.C. Gen. Stat. § 14-202.5 is not narrowly tailored, in part

> because it treats all registered sex offenders the same, regardless of the offense committed, the victim's age, whether a computer was used to facilitate or commit the offense, the likelihood of reoffending, and regardless of whether the person has been classified as a sexually violent predator. It burdens more people than needed to achieve the purported goal of the statute.

We agree. We begin by noting that Article 27A demonstrates the legislature's intent to distinguish between sex offenders based on the character of their convictions:

> It is the further objective of the General Assembly to establish a more stringent set of registration requirements for recidivists, persons who commit aggravated offenses, and for a subclass of highly dangerous sex offenders who are determined by a sentencing court with the assistance of a board of experts to be sexually violent predators.

N.C. Gen. Stat. § 14-208.6A (2011). Accordingly, our

general statutes contain various restrictions that are only applicable to specified subsets of sex offenders. *See* N.C. Gen. Stat. § 14-208.18(c) (2011) (governing premises restrictions that apply only to registered sex offenders who commit an offense defined in Article 7A or against a child under the age of 16); N.C. Gen. Stat. § 14-208.22 (2011) (requiring only offenders classified as "sexually violent predators" to provide additional identifying factors, offense history, and documentation of psychiatric treatment); N.C. Gen. Stat. § 14-208.23 (2011) (requiring only "sexually violent predators" to register for life); N.C. Gen. Stat. § 14-208.40A (2011) (allowing courts to implement satellite-based monitoring if (i) the offender has been classified as a sexually violent predator (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of N.C. Gen. Stat. §§ 14-27.2A or 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.).

In contrast, N.C. Gen. Stat. § 14-202.5 applies equally to every registered sex offender in the state, regardless of whether the offender committed any sexual offense involving a minor. For example, registered sex offenders convicted of misdemeanor sexual battery of an adult, pursuant to N.C. Gen. Stat. § 14-27.5A (2011), and those convicted of attempted rape of an adult, pursuant to N.C. Gen. Stat. § 14-27.6 (2011), may not access any commercial social networking Web site. Thus, the application of this statute is neither conditional upon showing that the offender previously used a social networking Web site to target children, nor does it require a showing that the offender is a current threat to minors.

Accordingly, the statute is not narrowly tailored because it fails to target those offenders who "pose a factually based risk to children through the use or threatened use of the banned sites or services." *Nebraska,* 898 F.Supp.2d at 1111. In essence, it burdens more people than necessary to achieve its purported goal.

We note that in *Doe v. Prosecutor* and *Doe v. Nebraska,* the challenged statutes were applicable only to those registered sex offenders whose offenses involved a minor. Nevertheless, the courts concluded that the statutes were not narrowly tailored, in part, because they also banned a broad scope of internet activity. As such, tailoring N.C. Gen. Stat. § 14-202.5 to those offenders who "pose a factually based risk to children" does not cure the statute's fatal flaw. *Nebraska,* 898 F.Supp.2d at 1111. Its overbroad application to all registered sex offenders is merely one example of how, when judged against the First Amendment, N.C. Gen. Stat. § 14-202.5 is not narrowly tailored, and thus unconstitutional.

ii. Substantially Broad Scope

Defendant asserts that an additional First Amendment concern is the fact that N.C. Gen. Stat. § 14-202.5 arbitrarily prohibits a broad scope of internet activity. We agree.

"Expansively written laws designed to protect children are *not* exempt from the constitutional requirement of clarity under both the First Amendment and the Due Process Clause[.]" *Id.* at 1112. Due process requires that laws give people of ordinary intelligence fair notice of what conduct is

prohibited. *Grayned v. City of Rockford,* 408 U.S. 104, 33 L.Ed.2d 222 (1972).

> The lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. . . . [G]overnment may regulate in the area of First Amendment freedoms only with narrow specificity[.] These principles apply to laws that regulate expression for the purpose of protecting children.

Brown v. Entm't Merchs. Ass'n, 2011 U.S. 4802 [*sic*], 37-38, 180 L.Ed.2d 708, 725 (2011) (quotations and citations omitted). Vague criminal statutes are disfavored because they restrict the exercise of First Amendment freedoms. *Reno v. American Civil Liberties Union,* 521 U.S. 844, 138 L.Ed.2d 874 (1997).

Here, the State fails to make a convincing argument as to why the statute is not unconstitutionally vague. N.C. Gen. Stat. § 14-202.5(b) defines "social networking Web site[s]" as being 1) "commercial" in that they "derive [ ] revenue," 2) "social" because they promote the introduction of individuals, and 3) facilitative of "networking" by allowing users to create personal profiles or have mechanisms that allow users to communicate with others, "such as message board[s], chat room[s], electronic mail, or instant messenger." N.C. Gen. Stat. § 14-202.5(b) (2011). N.C. Gen. Stat. § 14-202.5(c) provides two exceptions: 1) an offender may access a Web site that provides one discrete service, including photo-sharing, electronic mail, instant messenger, chat room or message board, or 2) he may

visit a Web site that is primarily intended to facilitate commercial transactions between members or visitors. N.C. Gen. Stat. §14-202.5(c) (1-2) (2011).

The construction of N.C. Gen. Stat. § 14-202.5(b) lacks clarity, is vague, and certainly fails to give people of ordinary intelligence fair notice of what is prohibited. We assume that persons of ordinary intelligence would likely interpret the statute as prohibiting access to mainstream social networking sites such as Facebook.com and Myspace.com. However, the ban is much more expansive. For example, while Foodnetwork.com contains recipes and restaurant suggestions, it is also a commercial social networking Web site because it derives revenue from advertising, facilitates the social introduction between two or more persons, allows users to create user profiles, and has message boards and photo sharing features. Additionally, the statute could be interpreted to ban registered sex offenders from accessing sites such as Google.com and Amazon.com because these sites contain subsidiary social networking pages: they derive revenue from advertising; their functions facilitate the social introduction of two or more people; and they allow users to create personal profiles, e-mail accounts, or post information on message boards. Thus, registered sex offenders may be prohibited from conducting a "Google" search, purchasing items on Amazon.com, or accessing a plethora of Web sites unrelated to online communication with minors. In its overall application, the statute prohibits a registered sex offender whose conviction is unrelated to sexual activity involving a minor from accessing a multitude of Web sites that, in all likelihood, are not frequented

by minors.

Furthermore, while the definition of "commercial social networking Web site" in N.C. Gen. Stat. § 14-202.5(b) is overbroad and vague on its face, N.C. Gen. Stat. §14-202.5(a) is similarly vague. This portion of the statute makes it unlawful for the offender to "access" a Web site where he "knows" that the site permits minor children to become members. The term "access" is defined as "[t]he act of approaching." *American Heritage Dictionary* 8 (3ed.1997). Accordingly, the statute is violated by merely pulling up a prohibited Web site, regardless of whether the offender searches the site or immediately leaves it upon recognizing that he is banned from its use. Furthermore, by its plain language, it is assumed that every offender inherently "knows" which Web sites are banned. However, given the vague definition of "commercial social networking Web site" and its broad reach, it is fundamentally impossible to expect an offender, or any other person, to "know" whether he is banned from a particular Web site prior to "accessing" it. Moreover, N.C. Gen. Stat. § 14-202.5 contains no defense to prosecution should a sex offender unintentionally access a banned Web site. Finally, should a registered sex offender have active Facebook, Amazon, or other accounts at the time of his conviction, the plain language of N.C. Gen. Stat. § 14-202.5 makes it unlawful to login to close the accounts. Accordingly, we conclude that N.C. Gen. Stat. § 14-202.5 is unconstitutionally vague on its face and overbroad as applied.

D. Additional Safeguards

Finally, we note that our General Assembly has

enacted laws aimed at protecting children on the internet without abridging First Amendment freedoms: N.C. Gen. Stat. § 14-202.3 (2011) prohibits solicitation of a child by a computer or other electronic device to commit an unlawful sex act; N.C. Gen. Stat. § 14-196.3 (2011) prohibits cyber-stalking; and Article 27A requires registered sex offenders to provide the State with "[a]ny online identifier the person uses or intends to use," N.C. Gen. Stat. § 14-208.7(b)(7) (2011). Accordingly, "[w]ith little difficulty, the state could more precisely target illicit communication, as the statutes above demonstrate." *Prosecutor*, 705 F.3d at 700.

III. Conclusion

In sum, we conclude that N.C. Gen. Stat. § 14-202.5 is not narrowly tailored, is vague, and fails to target the "evil" it is intended to rectify. Instead, it arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal. The statute violates the First Amendment's guarantee of free speech, and it is unconstitutional on its face and as applied. Accordingly, we vacate the trial court's judgment.

VACATED.

Judges GEER and DILLON concur.

STATE OF NORTH CAROLINA JUSTICE COURT COUNTY OF DURHAM	IN THE GENERAL COURT OF SUPERIOR DIVISION FILE NOS: 10 CRS 57146, 10 CRS 57148
STATE OF NORTH CAROLINA v. CHRISTIAN MARTIN JOHNSON and LESTER GERARD PACKINGHAM, Defendants.	**ORDER**

THIS MATTER coming to be heard before the undersigned presiding Superior Court Judge sitting in criminal session for the County of Durham, upon the defendants' Motions to Declare N.C.G.S. § 14-202.5 Unconstitutional, and having heard evidence and arguments of counsel for the defendant and the State, the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Christian Martin Johnson (hereinafter "defendant Johnson") was represented by Glenn Gerding, Esq.
2. Lester Gerard Packingham (hereinafter "defendant Packingham") was represented by Lynn Norton-Ramirez, Esq.
3. The State of North Carolina was represented by Assistant District Attorney Mark McCullough.
4. On September 20, 2010, defendants Johnson and Packingham were indicted by the Durham County Grand Jury for use of a Commercial Social Networking Web Site by a Sex Offender.
5. The indictment in 10 CRS 57146 alleges that on February 3, 2010, defendant Johnson maintained one or more Web pages on the commercial social networking Web site MySpace.com in violation of N.C. Gen. Stat. § 14-202.5.
6. The indictment in 10 CRS 57146 further alleges defendant Johnson was convicted of Taking Indecent Liberties with a Child in the Superior Court of Franklin County on September 30, 2008, which requires defendant Johnson to comply with the North Carolina Sexual Offender and Public Protection Registration Programs, N.C. Gen. Stat. Chapter 14, Article 27A.
7. On December 30, 2010, defendant Johnson filed a Motion to Declare N.C.G.S. § 14-202.5 Unconstitutional, asking the Court to enter an Order declaring N.C. Gen. Stat. § 14-202.5 unconstitutional and thereupon to dismiss the charge against defendant Johnson.

8. The indictment in 10 CRS 57148 alleges that on or about May 22, 2010, defendant Packingham maintained one or more Web pages on the commercial social networking Web site Facebook.com in violation of N.C. Gen. Stat. § 14-202.5.

9. The indictment in 10 CRS 57148 further alleges defendant Packingham was convicted of Taking Indecent Liberties with a child in the Superior Court of Cabarrus County on September 22, 2002, which requires defendant Packingham to comply with the North Carolina Sexual Offender and Public Protection Registration Programs, N.C. Gen. Stat. Chapter 14, Article 27A.

10. On December 9, 2010, defendant Packingham filed a Motion to Dismiss for Unconstitutionality of the Statute, asking the Court to enter an Order declaring N.C. Gen. Stat. § 14-202.5 unconstitutional and thereupon to dismiss the charge against him.

11. The interests of both defendants Johnson and Packingham are so aligned as to their respective positions that N.C. Gen. Stat. § 14-202.5 is unconstitutional based upon legal authorities upon which they respectively and jointly rely that these matters have been joined for the purpose of presentation of evidence, the submission of constitutional, statutory and case law authorities and the arguments of counsel.

12. The State and both defendants Johnson and Packingham respectively agree that the Web sites at issue in the above-captioned cases, namely

MySpace.com and Facebook.com, are commercial social networking Web sites as contemplated by N.C. Gen. Stat. § 14-202.5.

13. Both defendants Johnson and Packingham, in their motions and orally through their respective counsel, contend that N.C. Gen. Stat. § 14-202.5 is unconstitutional on its face and as applied to each of the named defendants.

14. The Court's determination of the constitutionality of N.C. Gen. Stat. § 14-202.5 as applied is an express request of each named defendant respectively.

15. While the parties have provided studious and insightful analysis concerning, among other things, the treatment of an Internet Web site under the statute which has as its primary purpose the facilitation of commercial transactions involving the goods or services between its members or visitors, yet has subpages similar to MySpace.com and Facebook.com; the treatment of computer search engines like Google, which has subpages similar to MySpace.com and Facebook.com; the treatment of governmental, quasi-governmental, religious, educational, medical and sports Web sites which have social networking components similar to MySpace.com and Facebook.com and a host of thoughtful hypothetical situations for contemplation, including the charging officer, Corporal Brian Schnee's, reflection on such hypotheticals to elicit his own views on the statute's meaning, much of this intellectual analysis is not relevant to, nor dispositive of, the legal issues to be considered by

the Court regarding whether the pending criminal charges against the named defendants should be dismissed due to the claimed unconstitutionality of N.C. Gen. Stat. § 14-202.5 as the statute has been applied to them.

16. Both defendants Johnson and Packingham were convicted sex offenders registered in accordance with the provisions of Article 27A, Chapter 14 of the North Carolina General Statutes at the time they allegedly committed the indicted offenses.

17. Based upon the testimony of the charging officer, Corporal Brian Schnee of the Durham Police Department, and the items contained in Defendant's Exhibits #1 and #3, the Court finds that, for the purposes of determining the constitutionality of the application of N.C. Gen. Stat. § 14-202.5 to defendants Johnson and Packingham, MySpace.com and Facebook.com are commercial social networking Web sites within the meaning of N.C. Gen. Stat. § 14-202.5(b).

18. Based upon the testimony of the charging officer, the items contained in Defendants' Exhibits #1 and #3 and the agreement between the parties presented in closing arguments, the Court finds that, for the purposes of determining the constitutionality of N.C. Gen. Stat. § 14.-202.5 to defendants Johnson and Packingham, MySpace.com and Facebook.com are commercial social networking Web sites which allow persons aged less than 16 years to become members and/or create or maintain Web pages thereon.

19. Based upon the testimony of the charging officer

and the items contained in Defendants' Exhibits #1 and #3, the Court finds that, for purposes of determining the constitutionality of N.C. Gen. Stat. § 14-202.5 to defendants Johnson and Packingham, neither MySpace.com nor Facebook.com are Internet Web sites which fall within the exceptions contemplated by N.C. Gen. Stat. § 14-202.(c).

a. Specifically, neither MySpace.com nor Facebook.com provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform.

b. Further, neither MySpace.com nor Facebook.com has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

CONCLUSIONS OF LAW

1. The Court derives jurisdiction over these matters by virtue of pending criminal charges against defendants Johnson and Packingham related to their alleged maintenance of one or more Web pages on a commercial social networking Web site as outlined above.

2. In the spirit of the wisdom oft displayed by the North Carolina appellate courts to determine the specific legal questions to be decided, this trial Court, in recognizing that its jurisdiction is derived from the pending criminal charges against the defendants for maintaining one or more personal Web pages on commercial social

networking Web sites, agreed by the parties to be such Web sites, will decide the specific legal questions which determine whether the defendants' charges should be dismissed due to the manner in which N.C. Gen. Stat. § 14-202.5 has been applied to each of them, and conversely will refrain from deciding whether the provisions of N.C. Gen. Stat. § 14-202.5 render it unconstitutional when all of its provisions have not been invoked under the charges, which give the trial Court its narrow jurisdiction.

3. The North Carolina Supreme Court has said, "[We] emphasize that the role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials. Rather, this Court must measure the balance struck by the legislature against the required minimum standards of the constitution." State v. Bryant, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005).

4. The disparate interests which are balanced in the current cases by the legislature, which this Court is to measure, are the activities of sex offenders on the one hand and the protection of minors on the other hand.

5. In measuring this "balance struck by the legislature against the required minimum standards of the constitution," as the standard enunciated by the Supreme Court in Bryant, this trial Court recognizes the legislature's enactment of N.C. Gen. Stat. § 14-208.5, the introduction to

Chapter 14, Article 27A of the General Statutes regarding the North Carolina Sexual Offender and Public Protection Registration Programs, which states the following as the purpose:

> "The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount government interest.
>
> The General Assembly also recognizes that persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. Release of information about those offenders will further governmental interests of public safety so long as the information released is rationally related to the furtherance of those goals.
>
> Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who

are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offerings to others as provided in this Article."

6. In applying the Bryant standard, this trial Court also notes the first paragraph of the Supreme Court's opinion rendered in that case:

> "Convicted sex offenders are a serious threat in this Nation. The victims of sex assault are most often juveniles, and when convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault. State v. Bryant, 359 N.C. at 554, 614 S.E.2d at 479 (quoting Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4, 155 L.Ed. 2d 98, 103, 123 S. Ct. 1160 (2003) (internal quotations omitted). Because of this public safety concern North Carolina, like every other state in the nation, enacted a sex offender registration program to protect the public from the unacceptable risk posed by convicted sex offenders." Id.

7. The High Court also stated in Bryant that "the twin aims of North Carolina Sex Offender and Public Protection Registration Program, public safety and protection, are clearly legitimate and of great importance to the State." Bryant at 560, 483.

8. The Supreme Court having found in Bryant that "the twin aims of the North Carolina Sex Offender and Public Protection Registration Program, public safety and protection, are cldarly legitimate and of great importance to the State," that "the victims of sex assault are most often juveniles, and when convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" and that the Court must "measure the balance struck by the legislature against the required minimum standards of the constitution," while understanding that "the role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials," this Court is to be guided by these principles enunciated by the State's highest Court in determining whether N.C. Gen. Stat. § 14-202.5 has been applied in an unconstitutional fashion against defendants Johnson and Packingham.

9. In light of the legal authorities cited, and applying their operation to the substantive and procedural facts presented in the case at bar, while enlightened by counsel and their respective arguments, this Court finds that:

    a. The protection of minors is a legitimate and important aim of the North Carolina Sex Offender and Public Protection Registration Program as enacted by the General Assembly of North Carolina.

    b. The General Assembly, as this State's legislature, is empowered and authorized to enact laws to facilitate the legitimate and

important aim of protecting minors from sex offenders who are registered in accordance with Chapter 14, Article 27A of the General Statutes.

c. N.C. Gen. Stat. § 14-202.5 is a statutory law enacted by the legislature to facilitate the legitimate and important aim of the protection of minors from sex offenders who are registered in accordance with Chapter 14, Article 27A of the General Statutes.

d. The role of the legislature is to balance the weight to be afforded disparate interests and to forge a workable compromise among those interests.

10. In the provisions of N.C. Gen. Stat. § 14-202.5, the legislature has balanced the weight to be afforded the disparate interests involved, specifically the activities of sex offenders and the protection of minors, in such a way as to forge a workable compromise among those interests.

11. In measuring the balance struck by the legislature against the required minimum standards of the Constitution, this Court does not find the application of N.C. Gen. Stat. § 14-202.5 to the facts and circumstances in defendants Johnson's and Packingham's cases is unconstitutional.

12. In analyzing the application of N.C. Gen. Stat. § 14-202.5 to the actions of the authorities and entities responsible for the institution of criminal charges against defendants Johnson and Packingham in their respective pending cases, this Court does not find the application of N.C. Gen.

Stat. § 14-202.5 to the facts and circumstances of defendants Johnson's and Packingham's respective cases is unconstitutional.

NOW THEREFORE IT IS ADJUDGED, ORDERED AND DECREED that N.C. Gen. Stat. § 14-202.5 is not unconstitutional as applied to defendant Christian Martin Johnson and Lester Gerard Packingham in their respective pending criminal cases and that, therefore, each of their respective motions to dismiss the charges pending against them for alleged violations of N.C. Gen. Stat. § 14-202.5 is hereby DENIED.

An oral ORDER to this effect being entered upon the record on the 7th day of April 2011, this written ORDER is hereby entered this the 11th day of April 2011, nunc pro tunc to the 7th day of April 2011.

/s/

The Honorable Michael R. Morgan
Superior Court Judge Presiding

N.C.G.S. § 14-202.5

(a) **Offense.** — It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

(d) Jurisdiction.—The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originnates in the State or is received in the State.

(e) Punishment.—A violation of this section is a Class I felony.

RECORD AND BRIEFS.

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In the
Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of North Carolina

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

To confront the threat sexual predators pose to children, the North Carolina Legislature enacted a statute that forbids registered sex offenders from accessing "commercial social networking Web sites" that permit minors to become members. N.C. Gen. Stat. §14-202.5. Petitioner, a registered sex offender, was convicted of violating the statute by creating and accessing a Facebook page. Facebook's terms of use expressly forbid convicted sex offenders from using the site. The question presented is:

Whether the North Carolina Supreme Court correctly held, applying intermediate scrutiny, that the prosecution of petitioner under §14-202.5 did not violate the First Amendment.

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INTRODUCTION

"Sex offenders are a serious threat in this Nation." *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (internal quotation marks omitted). This Court has recognized that victims of sexual assault are most often juveniles, and that "when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault." *Id.* North Carolina, like all other States, has responded to these facts by adopting statutes designed "to protect its communities from sex offenders and to help apprehend repeat sex offenders." *Id.*

Sexual predators' use of the Internet has created special challenges to society as it attempts to protect its most vulnerable members. The Internet does not merely allow predators to communicate more easily with children whom they stalk. It also allows them to gain intimate information about children's social lives, families, hobbies, and hangouts. Predators then use that information to target an unwitting victim, either in person or online, under the guise of familiarity or shared interests.

North Carolina enacted N.C. Gen. Stat. §14-202.5 to thwart that conduct. It does so by barring registered sex offenders from using the subset of social networking sites that can provide predators with the opportunity to obtain personal information

about children. Like other nonpunitive statutes imposing restrictive measures on sex offenders adjudged to be dangerous, it imposes criminal penalties for its violation. *See Smith v. Doe*, 538 U.S. 84 (2003); *see also Kennedy v. Louisiana*, 554 U.S. 407, 457-58 & n.5 (2008) (Alito, J., dissenting) (noting various measures developing across the country to respond to the problem of child sexual abuse). Petitioner does not, and cannot, dispute that he is a registered sex offender subject to §14-202.5; that Facebook is one of the websites the statute bars him from using; that he violated the statute by creating a profile page on Facebook; and that Facebook independently bars him from accessing the site based on his prior conviction as a sex offender. His First Amendment challenge to §14-202.5, as applied to him and facially, failed in the North Carolina state courts. It does not merit further review.

To assess the statute's validity, the North Carolina Supreme Court applied the intermediate-scrutiny test set out in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)—the very test petitioner would apply. The court's application of that well-established test does not conflict with the decisions of other courts that have addressed "social media" bans, all of which involved statutes imposing broader bans. Nor does the court's decision create any other meaningful conflict with another appellate court.

Petitioner is also a poor candidate to challenge §14-202.5, for he is objecting to a state ban on accessing a website that he had no legal right to access even absent the law. Nor can he take refuge in the statute's alleged vagueness, for he used a social networking site to which the statute unquestionably applies. Petitioner also failed to introduce evidence needed to assess his claim that the statute's alleged unconstitutional applications are substantial in comparison to its legitimate sweep.

In the end, petitioner's complaint boils down to a vociferous insistence that the North Carolina Supreme Court did not properly apply the *Ward* test. That error-correction claim fails on its own terms. Petitioner suggests a series of "less restrictive" alternatives, but none would protect children until it is too late—thereby defeating the very purpose of the statute. He also relies on faulty crime statistics that fail to support his counter-intuitive contention that convicted sex offenders pose no more threat to children than anyone else. Lastly, petitioner's claim that he lacks ample alternative channels of communication rests on an interpretation of that test that would defeat virtually any challenged statute. And it ignores the countless websites that §14-202.5 leaves open to registered sex offenders. Certiorari should be denied.

STATEMENT

A. Statutory Background.

In 1995, the North Carolina Legislature enacted North Carolina's "Sex Offender Registration Program" in an effort to protect minors from sexual predators. *See* N.C. Sess. Laws 1995-545; N.C. Gen. Stat. §14-208.5 *et seq*. The legislation detailed its purpose, specifically noting "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment" and that "persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare or the children in this State." N.C. Gen. Stat. §14-208.5. The legislation stated that its purpose was "to assist law enforcement agencies' efforts to protect communities" from such offenses. *Id*.

North Carolina's sex offender registry applies to sex offenders who have committed crimes against minors and those who have committed "sexually violent offenses." The registerable offenses in the latter category that could pertain to either minor or adult victims are:

- First degree rape;
- Second degree rape;

- First degree forcible sexual offense (engaging in a sexual act against another person by force and there are additional aggravating factors);
- Second degree forcible sexual offense (engaging in a sexual act with another person by force or with a person who is mentally disabled, mentally incapacitated, or physically helpless);
- Sexual battery (engaging in sexual contact with another person by force or with a person who is mentally disabled, mentally incapacitated, or physically helpless);
- Subjecting or maintaining a person for sexual servitude;
- Incest between near relatives; and
- Promoting the prostitution of or patronizing a prostitute who is a minor or mentally disabled person.

See id. §§14-208.6(4)(a), (5).[1] A registered sex offender may petition to be removed from the registry after 10 years of registration, but unless his

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[1] *See also* N.C. Department of Justice, Law Enforcement Liaison Section, *The North Carolina Sex Offender & Public Protection Registration Programs* 4-5 (Sept. 2014). Two of the registrable offenses relate to sexual activity by school personnel with a "student" of a primary or secondary school. The vast majority of such students are, of course, minors.

petition is granted the sex offender must remain on the registry for 30 years. *Id.* §14-208.6A.

In 2008, in an additional effort to confront the problem of sexual predators, the General Assembly enacted the statute at issue here—N.C. Gen. Stat. §14-202.5 ("Ban use of commercial social networking Web sites by sex offenders"). This legislation forbids registered sex offenders from accessing certain "commercial social networking Web sites" that minors frequent. *See id.* Through §14-202.5, North Carolina sought to address the menace of registered sex offenders compensating for lack of direct physical access by seeking out new, unsuspecting victims via "cyberspace." Through this modern method, a sex offender can remain invisible on a social networking site while gaining intimate and detailed information about children who use the site. Offenders use that information to prey on those children.

To convict a registered sex offender for violating §14-202.5, the State must show that the offender accessed a commercial social networking website where the offender knows the site permits minor children to become members or to create personal web pages on the site. *Id.* §14-202.5(a). The State further must establish that the site possesses the following attributes:

— It is a private, commercial, revenue-producing site. *Id.* §14-202.5(b)(1).

— It is a "social networking site" that allows for the social introduction between people. *Id.* §14-202.5(b)(2).

— It is a site that allows users to create pages or profiles that are capable of containing the user's name or nickname, photographs, other personal information, and links to other personal web pages on the site belonging to friends or associates. *Id.* §14-202.5(b)(3).

— It is a site that provides its users at least one mechanism to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger. *Id.* §14-202.5(b)(4).

Access to any websites that do not meet *all* of these criteria is not restricted under the statute. *See id.* §14-202.5(b). In addition, unlike the "social media bans" at issue in the federal cases relied upon by petitioner, North Carolina's statute exempts from its reach any site that "[p]rovides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." *Id.* §14-202.5(c)(1). Nor does the statute apply to a site that "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors." *Id.* §14-202.5(c)(2).

B. Facts.

On May 20, 2002, a Grand Jury in Cabarrus County, North Carolina indicted petitioner, then 21 years old, on two counts of statutory rape of a 13-year-old child. *See* Cabarrus County File Nos. 02 CRS 8475 and 02 CRS 8476. Pursuant to a plea bargain, petitioner entered a plea of guilty to taking indecent liberties with a child. *See* Cabarrus County Super. Ct., Judgment, No. 02CRS008475 (Sept. 16, 2002). Upon petitioner's conviction, he was ordered to register as a sex offender. (R. 72)[2]

In April 2010, Corporal Brian Schnee, a supervisor in the juvenile investigation division of the Durham, North Carolina Police Department, was working to identify registered sex offenders who were illegally accessing commercial social networking websites. (Tr. 132)[3] While perusing Facebook, Officer Schnee found a user profile page that (based on the profile photo) he believed belonged to petitioner—whom Schnee had previously determined was a registered sex offender living in Durham. (Tr. 132-34) On the Facebook page,

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[2] Citations to "R. ___" refer to the printed Record on Appeal, filed in the North Carolina Court of Appeals.

[3] Citations to "Tr. __" refer to the transcript of the trial proceedings in Durham County, North Carolina Superior Court.

petitioner was using the fictitious name "J.r. Gerrard" instead of his own name. (Tr. 133-34; R. 77)

Petitioner had posted a message on Facebook on April 27, 2010, praising God in the wake of dismissal of a traffic citation. (Tr. 134-35) Officer Schnee went to the Durham County Clerk of Court's office and obtained a certified copy of the citation and dismissal dated April 27, 2010. (Tr. 135-36) Based on this and additional information confirming that "J.r. Gerrard" was in fact petitioner, Officer Schnee obtained a search warrant for petitioner's residence. (Tr. 142)

During the search, Officer Schnee found and seized a picture of petitioner which was the same picture the officer had seen on the Facebook page; as well as other items corroborating petitioner's identity as the person who had opened and used a Facebook account. (Tr. 152, 153, 157) Officer Schnee also seized a notice of "Changes to the North Carolina Sex Offender Registration Laws," which petitioner had signed, describing the websites that §14-202.5 prohibited him from accessing. (Tr. 155-56)

C. Lower Court Proceedings.

1. Petitioner was indicted for violating N.C. Gen. Stat. §14-202.5. At trial, he moved to dismiss on the ground that the statute violated his First Amendment right to free speech. The trial court denied the motion (Pet. App. 54a-65a), and the North Carolina Court of Appeals denied his request for

interlocutory review. Following a trial, a jury convicted petitioner.

2. Petitioner appealed to the North Carolina Court of Appeals, which reversed the conviction. (*Id.* 35a-53a) The Court of Appeals ruled that §14-202.5 is a content-neutral speech regulation subject to intermediate scrutiny. And although it found "that the State has a significant interest in protecting minors from predatory behavior by sex offenders on the internet" (*id.* 46a), the court concluded that the statute is not narrowly tailored because it applies to sex offenders whose offenses involved adults and therefore might not be "a current threat to minors" (*id.* 48a).

The Court of Appeals also ruled that §14-202.5 is unconstitutionally vague. Disregarding limiting constructions proposed by the State, the court found that "the statute could be interpreted to ban registered sex offenders from accessing sites such as Google.com and Amazon.com." (*Id.* 51a) In its vagueness analysis, the court did not address whether petitioner's conduct—accessing Facebook—was clearly proscribed.

3. The North Carolina Supreme Court reversed, holding that §14-202.5 does not violate the First Amendment or the Due Process Clause. (*Id.* 1a-27a) The court stated that, although social networking websites provide both a forum for gathering

information and a means of communication, the essential purpose of §14-202.5 is to limit sex offenders' conduct, namely, "access[ing] certain carefully-defined Web sites." (*Id.* 9a) After finding that the statute is content-neutral, the court concluded that it should be assessed under the four-part intermediate-scrutiny test set out in *United States v. O'Brien*, 391 U.S. 367 (1968). (*Id.* 12a)

The court noted that the parties agreed that the statute satisfied the first two factors of the *O'Brien* test: whether the statute is within the government's constitutional powers and whether it furthers a substantial government interest. The court next ruled that the statute satisfies the third *O'Brien* factor, which asks whether the government interest is unrelated to the suppression of free expression. The court found that the statute's purpose is to "protect[ ] children from convicted sex offenders who could harvest information to facilitate contact with potential victims," an interest "unrelated to the suppression of free speech." (*Id.* 13a-14a)

The court then focused on the fourth *O'Brien* factor, which the court found to be the same as the test set forth in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989): whether the statute is narrowly tailored and leaves open "ample alternative channels for communication." (Pet. 42a) Applying that test, the North Carolina Supreme Court concluded that §14-202.5 is narrowly tailored. The court observed

that the statute contains specific exceptions for websites that provide discrete e-mail, chat room, photo-sharing, and instant messaging services. And it found that, even assuming petitioner's broad reading of the statute, it "leave[s] open ample alternative channels for communication." (*Id.* 16a (quoting *Ward*, 491 U.S. at 791)). The court pointed to the types of sites expressly excluded by the statute and the myriad other sites that do not fall within its terms. The court further noted that non-web-based methods of communication such as text messaging, FaceTime, and electronic mail remain open to petitioner.

After distinguishing the statutes struck down in a few other jurisdictions (*id.* 18a-19a), the North Carolina Supreme Court rejected petitioner's as-applied, overbreadth, and vagueness challenges. As to overbreadth, the court found that "the statute is drafted carefully to limit its reach by establishing four criteria that must be met before access to a commercial social networking Web site is prohibited" —factors which "ensure that registered sex offenders are prohibited from accessing only those Web sites where they could actually gather information about minors to target." (*Id.* 25a) As to vagueness, the court held that such a challenge "cannot be raised by a defendant"—such as petitioner—"whose conduct falls squarely within the scope of the statute." (*Id.* 27a)

REASONS FOR DENYING THE PETITION

I. THE NORTH CAROLINA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER APPELLATE COURTS.

Petitioner's contention that the North Carolina Supreme Court's decision conflicts with various federal court decisions falls short on multiple grounds. Only three of the cited decisions actually involved challenges to social-networking media bans—and only one of those was issued by an appellate court. All are readily distinguishable. Petitioner cites several other decisions as purportedly conflicting with some of the North Carolina Supreme Court's *reasoning*. But even if such a conflict were worthy of this Court's review—and it is not—the particular reasoning in question did not affect the outcome of this case. Still other decisions offered by petitioner involved statutes and orders even farther afield from this case. No genuine conflict among the appellate courts exists.

A. North Carolina's statute differs from the state social networking bans other courts have addressed.

1. Only one appellate court has struck down a "social media" ban, and that case addressed a state law that differed from §14-202.5 in significant ways—ways the court itself recognized may prove

decisive. In *Doe v. Prosecutor, Marion County*, 705 F.3d 694 (7th Cir. 2013), the Seventh Circuit invalidated an Indiana law that banned sex offenders' use of social networking sites. *See* Ind. Code §35-42-4-12. The Indiana law, however, was broader in scope than North Carolina's law and narrower in purpose.

Indiana's law solely "target[ed] the evil of improper communications with minors." *Marion County*, 705 F.3d at 695. The State therefore agreed that a sex offender's use of social media is not a problem the statute seeks to address "as long as he does not improperly communicate with minors." *Id.* at 699. The purpose of North Carolina's statute is quite different. It does not merely regulate the actual contact a sex offender might ultimately make with a victim. Rather, North Carolina recognized the additional danger of sex offenders' increasing use of social networking sites to troll for victims, which requires time spent on certain fertile sites before any actual contact is ever made.[4] It is this protective purpose that North Carolina's statute seeks to achieve.

The Seventh Circuit in *Marion County* recognized the importance of the different statutory

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[4] *See, e.g.*, Online Predators/Internet Predators, http://www.minormonitor.com/resource/online-predators/ (March 14, 2012) (discussing predators' use of online tools to target victims) (last visited June 29, 2016).

objectives, and expressly reserved whether the outcome might be different if the state law were enacted to serve the broader purpose served by North Carolina's law. Thus, the court stated:

> [W]e do not foreclose the possibility that keeping certain sex offenders off social networks advances the state's interest in ways distinct from the existing justifications. For example, perpetrators may take time to seek out minors they will later solicit. This initial step requires time spent on social networking websites before the solicitation occurs.

Id. at 701. And when a State enacts a law designed to serve that objective, the court will have to revisit the constitutional issue:

> In the future, the state may argue that prohibiting the use of social networking allows law enforcement to swoop in and arrest perpetrators before they have the opportunity to send actual solicitation. This argument remains speculative.

Id. In short, said the court, its analysis was limited to the rationale and legislation before it, and its decision "should not be read to limit the legislature's ability to craft constitutional solutions to this modern-day challenge." *Id.* Petitioner disregards that admonition, and the Seventh Circuit's express reservation, when he nonetheless insists that the

court's decision conflicts with the North Carolina Supreme Court's decision.

On top of that, the scope of the statutes at issue in the two cases differed. In keeping with Indiana's express purpose of regulating the actual contact a sex offender might have with a minor, its "social media ban" was broadly written to cover virtually every Internet site imaginable, and amounted to a near-complete Internet ban. *See id.* at 698; Ind. Code §35-42-4-12 (prohibiting use of "a social networking website or an instant messaging or chat room program"). By contrast, as discussed, North Carolina's statute focuses only on sites that allow for posting of personal identifying information and allow the users to link to others' personal pages. It expressly exempts sites that provide only single, discrete communications features, which would not allow the user to invisibly use them or invisibly ferret out vast personal information from other users. *See* N.C. Gen. Stat. §14-202.5(c)(1). The purported conflict between the North Carolina Supreme Court decision and *Marion County* is illusory.

2. The other two decisions striking down social-media bans are *Doe v. Jindal*, 853 F. Supp. 2d 596, 607 (M.D. La. 2012), and *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1112 (D. Neb. 2012). As an initial matter, of course, a conflict between an appellate court and a federal district court is not the sort of the

conflict that warrants a grant of certiorari. *See* Stephen M. Shapiro et al., *Supreme Court Practice* §4.8, at 257 (10th ed. 2013). In any event, the state statutes at issue in those two cases, like the Indiana statute reviewed in *Marion County*, were far broader in scope than §14-202.5.

Thus, the Louisiana statute at issue in *Jindal* prohibited use of "social networking websites, chat rooms, and peer-to-peer networks." La. Rev. Stat. Ann. §14:91.5. The Nebraska statute at issue in *Nebraska* prohibited use of "a social networking website, instant messaging, or chat room service." Neb. Rev. Stat. §28-322.05. Neither contained the broad exception set forth in N.C. Gen. Stat. §14-202.5(c). The effect of those statutes was to foreclose the Internet as a medium of speech for sex offenders. *See Jindal*, 853 F. Supp. 2d at 607; *Nebraska*, 898 F. Supp. 2d at 1117. That is neither the purpose nor the effect of North Carolina's legislation.

Moreover, as noted by the North Carolina Supreme Court, after the district court declared Louisiana's statute unconstitutional in *Jindal*, the Louisiana legislature amended its statute, making it similar to North Carolina's statute. (Pet. App. 19a (citing La. Rev. Stat. Ann. §14:91.5)). The amended Louisiana statute changed the name from "social media" to "social networking," added that the use must be "intentional," removed "chat rooms and peer-to-peer networks," and excepted many sites that

were previously banned, such as "websites that only offer photo sharing, email, or instant messaging." *(Id.)* The new version of Louisiana's statute has not come under constitutional attack, and already has been viewed as "likely narrowly tailored to the significant government interest of protecting children from sex offenders on the Internet." Comment: *Why Don't You Take a Seat Away from that Computer?: Why Louisiana Revised Statute 14:91.2 Is Unconstitutional*, 73 La. L. Rev. 883, 883-84 (2013) (analyzing the prior version of the Louisiana statute, while noting that the amended version does not suffer from the same defects). North Carolina's statute, as written, already is narrowed in all of those ways.

B. The other lower court decisions upon which petitioner relies do not remotely create a conflict worthy of this Court's review.

Lacking a genuine and direct conflict, petitioner —perhaps believing in quantity over quality—points to a variety of appellate decisions *not* involving social-media statutes which supposedly conflict in some way with the North Carolina Supreme Court's reasoning. None creates a conflict meriting this Court's review.

First, petitioner points to cases holding that a law limiting use of Internet sites should be analyzed

as a speech regulation, not (as the North Carolina Supreme Court ruled) as a regulation of conduct. (Pet. 28) But as discussed further in §II, *infra*, the North Carolina Supreme Court assessed §14-202.5 under the *Ward* test—the precise test used in the cases that supposedly conflict with its decision and the precise test petitioner would apply. *See Doe v. Harris*, 772 F.3d 563, 576-77 (9th Cir. 2014) (applying *Ward*); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1131-35 (10th Cir. 2012) (same); *Marion County*, 705 F.3d at 698-99 (same).

Petitioner next relies on several decisions striking down "measures requiring registrants to provide their 'internet identifiers' to the government." (Pet. 30) But these decisions were based upon the principle of anonymous speech, and turned on the fact that the statutes at issue effectively gave law enforcement unfettered discretion to disclose the identifying information to the public, thus chilling the registrants' right to speak anonymously on the entire Internet. As petitioner concedes, the other federal court of appeals to address such a law upheld it, because this concern was absent. (*Id.* n.11 (citing *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010) (upholding "Internet identifier" regulation that limited law enforcement's sharing of the identifiers to other law enforcement agencies and did not allow for disclosure to the public at large)).

Finally, petitioner relies on cases rejecting conditions of supervised release that barred convicted sex offenders from accessing *the entire Internet* and, in two of the cases, even using a computer. (Pet. 31-32) Suffice to say, a sweeping ban on access to the entire Internet—let alone a ban on using a computer—is far less tailored and far harder to justify than the more limited ban imposed by §14-202.5.

* * * * *

The only lesson that can be drawn from the assortment of cases offered by petitioner is that states and judges are struggling with the best way of addressing the challenge of sexual offenders' recidivism and the threat they pose to children. The statutes, regulations, and release conditions they adopt will vary from state to state and judge to judge; some will be upheld and some will be struck down. There may even be some occasional tension between rulings. But for the moment, the courts are all applying settled First Amendment jurisprudence to the specific laws and conditions before them, reaching results that can be easily reconciled. There is no pressing need for this Court's intervention.

II. THE NORTH CAROLINA SUPREME COURT'S APPLICATION OF INTERMEDIATE SCRUTINY TO N.C. GEN. STAT. §14-202.5 DOES NOT MERIT THIS COURT'S REVIEW.

Once all the smoke has cleared, the petition can be seen for what it really is: a disagreement with a state court's application of well-settled law to a little-copied statute in a case with an undeveloped record and in which many of the alleged problems with the statute are not present.

1. The first section of the petition (at 13-18) is devoted to contesting the North Carolina Supreme Court's conclusion that §14-202.5 regulates conduct, not speech. Whether the court got that right is an interesting question—but it has absolutely no bearing on the outcome of the case. After ruling that §14-202.5 regulates conduct, the North Carolina Supreme went on to apply the *O'Brien* test to assess its constitutionality. And as the court recognized, this Court stated in *Ward* "that the *O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" 491 U.S. at 798 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984)).

Consistent with that understanding, the North Carolina Supreme Court expressly found that the

fourth *O'Brien* factor embodies the *Ward* test for assessing content-neutral statutes, which asks whether the law is "narrowly tailored to achieve a significant governmental interest" and "leave[s] open ample alternative channels for communication of the information." (Pet. 42a (quoting *Ward*, 491 U.S. at 791)). That is the very test petitioner would apply to §14-202.5 (*see id.* 18), for he does not argue that §14-202.5 is content-based and subject to strict scrutiny (*see id.* 18 n.4).[5]

To be sure, petitioner stridently disagrees with the North Carolina Supreme Court's application of *Ward*. But his fulminations cannot change the fact that this is *all* that is at issue here. *See Supreme Court Practice, supra*, §6.37(i)(3), at 507 ("The Court will not ordinarily entertain cases involving" errors "'consist[ing] of the misapplication of a properly stated rule of law.'").

2. There are additional prudential reasons why this case does not merit further review. Petitioner asserts an as-applied challenge to §14-202.5, yet that challenge suffers from flaws specific to his case. Petitioner was convicted for creating and accessing a Facebook page. He has never disputed that Facebook is clearly covered by the statute. Any

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[5] Petitioner later suggests (at 34) that §14-202.5 discriminates based on the identity of the speaker, but when setting out his merits argument he relies solely on the *Ward* test. (*See* Pet. 18-26)

uncertainty about the scope of the statute cannot excuse his behavior.

More importantly, Facebook expressly bars convicted sex offenders from its site. Its terms of service expressly declare that: "You will not use Facebook if you are a convicted sex offender." Facebook.com, Terms of Service, Statement of Rights and Responsibilities, Registration and Account, item 6, www.facebook.com/legal/terms. Facebook's ban on sex offenders is no fortuity or technicality. The Attorneys General of 49 states investigated Facebook and MySpace out of concern that sexual predators were using those sites to stalk children. The investigations led to agreements between the Attorneys General and the two social networking sites under which the sites agreed to take a series of steps to better protect children from predators.[6]

As applied in this case, therefore, §14-202.5 did not bar petitioner from accessing any website he was otherwise permitted to access. He was barred from Facebook regardless. Even if the statute were not on

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[6] *See* Joint Statement on Key Principles of Social Networking Sites Safety (Jan. 14, 2008) (MySpace), *available at* http://www.ncdoj.gov/getattachment/78eac9be-5ee9-4ffe-b2fb-1e76da3a4574/MySpace-Agreement-Joint-Statement-on-Key-Princip.aspx; Joint Statement on Key Principles of Social Networking Sites Safety (May 8, 2008) (Facebook), *available at* http://www.nj.gov/oag/newsreleases08/Facebook-Joint-Statement.pdf.

the books, petitioner had no right to take advantage of what his amici (at 7) insist is a "uniquely effective form of communication." Put another way, when it comes to Facebook, petitioner cannot demonstrate "the existence of a traditional right of access." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984).

Petitioner insists that Facebook's own ban on convicted sex offenders is of no moment because §14-202.5 does not "impose[] *criminal* punishment for violating private agreements with website operators." (Pet. 25 n.7) That misses the point. As applied in his case, §14-202.5 barred petitioner from accessing a website he had no legal right to access. *Cf. Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (holding, in lawsuit brought by person threatened with arrest for attempting to distribute handbills at a shopping mall in violation of the mall's policy, that the policy did not violate the First Amendment). It surely is a strange First Amendment claim to say that the State is suppressing speech the speaker had no independent lawful right to make. At the very least, petitioner is a poor representative of the class of individuals supposedly burdened by §14-202.5.

3. This flaw in petitioner's case affects his facial challenge as well. In *United States v. Stevens*, 559 U.S. 460 (2010), the Court explained that "[t]o succeed in a" facial challenge "[i]n the First Amendment context," a claimant must show

overbreadth—*i.e.*, that "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 472-73 (internal quotation marks omitted).[7] Social networking sites that independently bar convicted sex offenders complicate making that assessment here.

The person challenging a statute as overbroad "bears the burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (internal quotation marks omitted). Yet petitioner has provided no evidence regarding what percentage of the social networking "market" is already out of bounds to convicted sex offenders. Petitioner also suggests (at 20) that §14-202.5 is overbroad because it applies to sex offenders who committed crimes against adults, not minors—but here too failed to provide any evidence regarding the proportion of registered offenders falling within that category. Nor has petitioner documented what percentage of registered sex offenders are on parole, probation, or supervised release, a category he recognizes are "entitled to *less* robust constitutional protections." (Pet. 27)

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[7] Petitioner asserts that his "facial challenge should succeed without resort to the overbreadth doctrine[ ]" (Pet. 27 n.9), but does not reconcile that view with *Stevens*.

All told, this case is an exceedingly poor vehicle through which to address the constitutionality of §14-202.5, even if the Court thought the issue might one day warrant its consideration.

III. THE NORTH CAROLINA SUPREME COURT'S DECISION WAS CORRECT.

The North Carolina Supreme correctly concluded that §14-202.5 is "narrowly tailored to achieve a significant governmental interest" and "leave[s] open ample alternative channels for communication of the information." (Pet. App. 42a (quoting *Ward*, 491 U.S. at 791)). Petitioner's arguments to the contrary (Pet. 18-26) distort the court's reasoning and the *Ward* test, and ignore the animating purpose behind the statute.

A. Section 14-202.5 is narrowly tailored.

1. *Ward* held that a content-neutral statute that affects speech need not be the "least restrictive or least intrusive means" of achieving the government's interest. 491 U.S. at 798. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800. To faithfully apply that narrow-tailoring standard, it is necessary to fully

appreciate the state interest the challenged statute is serving.

As discussed in above, §14-202.5 reflects the North Carolina Legislature's recognition that a mere ban on on-line communication between a registered sex offender and minors does not suffice. Rather, as one Web-based child protection tool explains, sex offenders

> use information made available on social networking sites to gather information such as where the child lives, his day to day activities and routines, who he hangs out with, etc. Through the social networking page, the predator is able to gather enough information to commit heinous crimes against children.

Online Predators/Internet Predators, http://www.minormonitor.com/resource/online-predators/ (last visited June 29, 2016).

Further,

> [p]redators who choose their victims through social networking are often hard to identify once the crime takes place. This is especially true if the predator never actually contacted the victim using the social networking site but instead just used it to gain a wealth of information that made the victim an easy target.

Id. Section 14-202.5 is carefully tailored to address precisely those problems.

2. Petitioner is therefore wrong when he posits several other measures that purportedly "could serve [the State's] interests just as well." (Pet. 18 (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2537 (2014)). In relying on those other measures, petitioner disregards the statute's purpose and effectively seeks to hold the legislation to the "least restrictive means" test.

For instance, petitioner suggests that the remedy is charging a defendant with the sex crimes that result from the contact. (Pet. 21) At that point, however, the damage is already done, if it is ever detected. This alternative does not adequately serve the protection purpose underlying the statute. When the danger to society, such as sexual predation, is both great and difficult to detect, preventive measures may serve the State's compelling interests. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 207-08 (1992) (upholding ban on campaigning within 100 feet of a polling place); *Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (upholding ordinance prohibiting adult theaters from locating within 1000 feet of residential areas or schools); *Frisby v. Schultz*, 487 U.S. 474, 476, 481-88 (1988) (upholding town ordinance banning picketing "before or about" any residence); *Hill v. Colorado*, 530 U.S. 703, 707, 725-30 (2000) (upholding statute prohibiting certain

speech-related conduct within 100 feet of the entrance to any healthcare facility).

That is why petitioner misses the point when he says (at 12) that he "was convicted for saying 'Thank you Jesus' on an internet site." He was not convicted for saying those specific words; he was convicted for accessing a social networking site that enables sexual predators to "gather information such as where [a] child lives, his day to day activities and routines, who he hangs out with, etc."

Petitioner fares no better in suggesting that the State require social networks to "ensure that minors obtain adult permission before establishing accounts and afford parents ongoing access." (Pet. 3, 21) Even assuming such a law would be constitutional, *but see Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), any marginal reduction in the number of children on those sites would hardly stop predators from gathering information about the many children who remain.

3. Petitioner nonetheless insists that the statute sweeps too broadly, covering too many websites and too many offenders. The former complaint reprises in a different guise the due process argument he no longer directly makes. But North Carolina's statute excludes from its purview all sites other than those through which registered sex offenders can access information about minors by viewing a personal page

containing identifying information about the creator of the page, and which can link to other such pages on the site.[8]

As the Attorney General explained to the courts below, it therefore does *not* encompass cites such as Google.com, Amazon.com, or Foodnetwork.com. *See* New Brief for the State (Appellant) at 35-36. Each of those sites lacks features required by §14-202.5, such as allowing a minor to create a webpage or having webpages that have links to friends that can be accessed by visitors. Similarly, nytimes.com is not covered by the statute because the site does not allow for creation of detailed personal user pages that link to other users' personal pages while also

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[8] The function of linking to other users' pages is the hallmark of a social networking site. To meet the definition of "social networking site" under §14-202.5, the site must allow the user to include all of the information listed in subsection (b)(3), including the ability to link to other users' pages. *See* §14-202.5(b)(3) (using conjunctive "and"). The site must also provide at least one of the communications options listed under subsection (b)(4). *See id.* §14-202.5(b)(4) (using disjunctive "or"). This reading comports with basic principles of statutory construction. *See, eg., Frisby v. Schultz*, 487 U.S. 474, 483 (1988)(statutes to be narrowly read); Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends* 9 (Congressional Research Service 2011), (use of "and" vs. "or"), *available at* http://fas.org/sgp/crs/misc/97-589.pdf.

providing a message board, chat room, email, or instant messaging platform.

In addition, "as a matter of natural meaning, an educated user of English would not describe" sites such as nytimes.com or Foodnetwork.com as "social networking sites." *See Bond v. United States*, 134 S. Ct. 2077, 2090 (2014) (beginning interpretation of statutory term by looking at the "natural meaning" of the term). And, of course, statutes should be construed "to avoid constitutional difficulties." *Frisby*, 487 U.S. at 482. Moreover, the remedy in the unlikely event some offender were charged with accessing Foodnetwork.com would be to hold the State to its burden of proving the site meets the definition. *See United States v. Williams*, 553 U.S. 285, 305-06 (2008) (noting that in "close cases," the remedy lies not in facially invalidating an allegedly vague statute, but in the requirement of proof beyond a reasonable doubt).

4. Petitioner also faults §14-202.5 for reaching all registered sex offenders, including those who might not have sexually assaulted minors. But the inclusion of select offenses that could have been committed against an adult strongly furthers the purpose of protecting minors.

Research shows a high cross-over rate for types of sexual offenses. Specifically, studies show that adult-victim rapists "often sexually assault

children," with the majority of studies finding "rates in the range of 50 to 60 percent." *Sex Offender Management Assessment and Planning Initiative* [hereinafter "SOMAPI"] 61-62 (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, October 2014, NCJ 247059), *available at* http://smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf. Studies also show that "incest offenders often sexually assault children both within and outside their family," and that "64-66 percent of incest offenders report sexually assaulting children who they were not related to." *Id.* These "[i]ndiscriminate offenders, also known as mixed offenders, report sexually abusing both adults and children equivalently." *Id.* at 65. "Taken together, crossover findings suggest that traditional typologies based on victim type may not be useful to allocate resources, evaluate risk, or devise individualized treatment interventions." *Id.* at 63. Given this research, it would be foolish to assume that a sex offender bold enough to assault an adult does not present a danger to a 16-year-old.

Petitioner is on even weaker ground when he suggests that registered sex offenders pose no greater risk than members of the general public. (Pet. 23 & n.6) Not surprisingly, no lower court in this case made a finding of fact with respect to that

unsupported and astonishingly counter-intuitive claim. And the claim merits little credence, in large part because recidivism rates do not nearly reflect the actual rate of re-offense by sex offenders.

Because of the shame and degradation peculiar to sex crimes, sexual offenses are grossly under-reported crimes. *See* National Institute of Justice, "Reporting of Sexual Violence Incidents."[9] Researchers on recidivism "widely agree that observed recidivism rates are underestimates for the true reoffense rates of sex offenders" due to the low frequency with which sex crimes are reported and the large number of sex crimes that are unsolved or not prosecuted. *See* SOMAPI at 89-91.

Under conditions of guaranteed confidentiality, for instance, one study showed that only 3.3 percent of actual hands-on sex offenses, such as rape or child molestation, resulted in arrest. *Id.* at 91. Another study showed that only 5 percent of rapes and child sexual assaults self-reported by offenders during treatment actually were reflected in official records. *Id.* When polygraphs were used, the number of victims reported by incarcerated sex offenders rose

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[9] The report is *available at* http://www.nij.gov/topics/crime/rape-sexual-violence/pages/rape-notification.aspx. The reports cites C.M. Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992–2000* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, August 2002, NCJ 194530).

from the average of 2 reported in official records to an average of 18. *Id.* at 61. The average number of offenses to which sex offenders admitted to committing rose from 12 to 137. *Id.* And although petitioner correctly reports that sex offenders had a lower overall re-arrest rate than non-sex offenders, their sex-crime arrest rate was four times higher than the rate for non-sex offenders. *Id.* at 93.

This Court was therefore on solid ground when it recognized that "when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault." *Conn. Dep't of Pub. Safety*, 538 U.S. at 4 (internal quotation marks omitted). And certainly far more likely than a member of the general public.

5. Having criticized the statute for its breadth, petitioner turns around and faults the statute for its exclusion of websites that provide solely a chat room, message board platform, email, photo-sharing, or instant messenger. (Pet. 23-24) Yet inclusion of sites with only one such feature would effectively have banned most sites on the Web, an outcome the legislature carefully tried to avoid. Moreover, discrete chat room or messaging services do not contain the transparent level of personal information and photographs available on social networking sites. Nor can users of a chat room or messaging service remain invisible to others participating in the

feature. North Carolina thus specifically exempted sites whose inclusion would not significantly further the legislation's purpose but would render the statute too far-reaching—just as one would want a state legislature to do.

B. Section 14-202.5 leaves ample alternative channels of communication.

With its narrow definition of "social networking sites" and exemptions for sites that do not significantly further its purpose, North Carolina's legislation leaves open ample "alternative channels for communication"—and not just generally, but on the Internet.

A sex offender may use any of the sites that do not fall under the definition of "commercial social networking sites" that allow members under the age of 18. This includes social networking sites for adults only, social networking sites with limited features, non-commercial social networking sites, and government sites. A sex offender can create his own webpage, blogs, and podcasts, and visit those of others. He may take out an advertisement on any site on the Internet, use a mail exploder to send his messages, or have a friend post a message on Facebook and directly attribute the message to him. He can navigate to and post on popular sites like Salon.com, Slate.com, and Huffington post.com. He can go to commercial sites like eBay, Yelp, and

Amazon.com. North Carolina's statute leaves open myriad alternative means for Internet speech.

Petitioner insists, however, that social networking sites are unique and that "it is essentially definitional that equivalent 'alternatives' will not exist." (Pet. 25) That cannot be the test. If an alternative channel of communication had to be a perfect substitute, few if any time, place, or manner restrictions would be upheld. All litigants challenging restrictions on a particular channel of communication prefer that channel to others based on its particular features. But the First Amendment allows the government to restrict access to particular means of communication where ample *alternative* ways to communicate remain.

While no single "alternative channel" may equal Facebook's special appeal to those who use it, the vast array of different sites that remain available to sex offenders—but on which minors cannot be easily and invisibly identified—provides ample alternative channels of communication to Facebook and its kindred.[10]

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[10] Both petitioner and his amici fault the North Carolina Supreme Court for providing some specific examples of alternative websites still available to registered sex offenders. (*See* Pet. 24 (citing Pet. App. 17a-18a); Law Professors Amicus Br. 10) They fail to recognize that the court was addressing petitioner's specific examples of sites he imagined to be off-limits. The court was

The principal case upon which petitioner's amici rely, *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), is far afield from this case. (*See* Law Professors Amicus Br. 9-12) *City of Ladue* involved a ban on residential signs, a means of communication this Court found to be "venerable" and "both unique and important" based on the distinct message such signs convey, their affordability, and the "special respect for individual liberty in the home." *Id.* at 54-58. Banning access to Facebook cannot be compared to a government effort to limit an individual's ability to speak on his own property.

Nor, finally, are amici correct that this Court's intervention is needed to resolve a disagreement among lower court decisions about how ample alternative channels should be understood. (Law Professors Amicus Br. 12) The different results in the cases discussed by amici are exactly what one would expect when a general legal standard is applied to widely varying statutes and rules. There is no reason to believe the courts in the two supposedly competing camps would not have decided all the cases precisely the same way.

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demonstrating that even if petitioner were correct in asserting, for example, that Foodnetwork.com fits the definition of a "commercial social networking site" (it does not), petitioner could use pauladeen.com for his food interests; even if he were correct in asserting that the nytimes.com is a "commercial social networking site" (it is not), he could obtain the news from other websites.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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June 2016

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RECORD AND BRIEFS

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In the Supreme Court of the United States

LESTER GERARD PACKINGHAM, PETITIONER

v.

STATE OF NORTH CAROLINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The reason North Carolina's law has (so far) been "little copied" (Opp.13) is that it is, as the three federal courts to consider similar measures have concluded, patently unconstitutional.

Section 202.5 escaped that fate—and petitioner's felony conviction stands—because the state Supreme Court, unmoved by the Free Speech rights of the citizens whom the law targets (the State here refers to them as "predators"), failed to subject the measure to *any* meaningful First Amendment scrutiny. The court pronounced the measure a "*conduct* regulation" and then invented its own "narrow tailoring" test, that, unlike this Court's, disregards the quantum of protected activity needlessly restricted and instead rewards the government if "it could have been worse."

The Brief in Opposition does not seriously defend that decision—indeed it obliquely concedes the lynchpin error of holding that Section 202.5's burdens are "incidental." Nor does the State supply the constitutionally-mandated analysis the court failed to perform. Rather, it endeavors to dress these glaring defects in drab garb, proclaiming the state Supreme Court's flight from bedrock First Amendment principles a mere "application error" and manufacturing "prudential" reasons against intervention "at this moment." Opp.20.

These generic assurances fail. The decision did not "state," Opp.22, let alone apply, what *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989), described as the "essence of the narrow tailoring" analysis. And the case-specific features the State highlights are not "flaws": A person prosecuted for First Amendment

activities that "clearly" violate an unconstitutional law is ideally situated to assert its invalidity; and the "behavior," Opp.23, that made petitioner a felon under Section 202.5—expressing delight at avoiding a traffic ticket on a website that also has teenage members—requires no "excuse." *Id.*

Intervention is warranted not merely to achieve interpretive uniformity but to restore bedrock protections that this statute and decision have stripped away. The need is "pressing," Opp.20, because North Carolina continues to prosecute citizens (well over 1,000) for First Amendment activities outside the State's power to proscribe.

I. The Statute Is Fundamentally Unconstitutional

The State (Opp.26) faults petitioner for "ignor[ing]" Section 202.5's "animating purpose" and for highlighting that his offense consisted of posting "Thank you Jesus," when, the State says, he was convicted for accessing the type of website that would "enable[]" a "predator[]" to "gather information" about teenage account holders, Opp.29, which could then be used to make contact and ultimately commit assault.

1. But it is the State that "misses the point." *Id.* The petition neither misunderstood nor denied the importance of the interests advanced. See, *e.g.*, Pet.7, 13, 19, 20, 24, 27 (acknowledging "lurking" and "harvesting information" justification); *id.*21 (recognizing that government could criminalize "'gathering information' about minors for criminal purposes"). And under the First Amendment, petitioner's benign "post" is centrally relevant—not as evidence of governmental hostility to his "words," but

rather as proof of the disconnect between what the statute makes criminal and the "evils" targeted. (The State, which searched petitioner's computer and Facebook records, Tr. 139, 142, *never* alleged nefarious "harvesting" or communication of any kind).

2. As petitioner explained, the premise of Section 202.5—and the State's defense here—that the "government may * * * prohibit speech" that is harmless in itself "because it increases the chance an unlawful act will be committed 'at some indefinite future time,'" *Hess* v. *Indiana*, 414 U.S. 105, 108 (1973), is one "settled First Amendment jurisprudence" (Opp.20) condemns. See *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 250 (2002) (striking down law for punishing "speech that record[ed] no crime and create[d] no victims").

The bedrock principle that Section 202.5 defies has been enforced in cases involving statutes aimed at preventing violent revolution, see *De Jonge* v. *Oregon*, 299 U.S. 353, 364-365 (1937), imminent lawless action, *Hess*, and fraud. Indeed, when this Court recognized that "[t]he prospect of crime * * * does not justify laws suppressing protected speech" and that there "are many things innocent in themselves * * * that [may not] be prohibited because they can be misused," for "immoral purposes," *Ashcroft*, 535 U.S. at 251, the "crime[]" it referred to was *sexual abuse of children*, and the "innocent" "thing[]" was "virtual" child pornography. The government's defense of that law, which included evidence that the expression proscribed "can lead to actual instances of child abuse," was rejected because "[t]he harm does not necessarily follow from the speech, [and] depends

upon some unquantified potential for subsequent criminal acts." *Id.* at 250.

So too here. Indeed, Section 202.5 is not, as the State suggests, only a *little* unconstitutional. The breadth and character of First Amendment activity the law impermissibly punishes place it far beyond other measures held facially unconstitutional. The *innocent* speech vindicated in *United States* v. *Stevens*, 559 U.S. 460 (2010), *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011), and *United States* v. *Alvarez*, 132 S. Ct. 2537 (2012), was, respectively: depictions of animal cruelty, violent video games sold to minors, and lies about military valor. *This* law suppresses, *inter alia*, vast swaths of political, artistic, and religious communication and association and prevents access to important information unavailable from any other source. And it denies *the public* the opportunity to hear from, inform, and argue with those the law targets.

II. The Decision Defied This Court's Heightened Scrutiny Precedents

The State offers no defense of the keystone ruling below, that Section 202.5 is "conduct regulation," and its effort to cordon off that error as harmless fails. The error was intertwined with another equally important one, *not* disavowed here—failure to accept that "information gathering" is fully protected under the First Amendment (though, as with expression, abuses may be punished). See Pet.16. And the petition did not accept (Opp.2) that less-than-strict First Amendment scrutiny is appropriate; it maintained, like the dissenting Justices below, that Section 202.5 is so plainly unconstitutional as to make differences between the top "tiers" immaterial. See

McCutcheon v. *Federal Election Comm'n*, 134 S. Ct. 1434, 1446 (2014).

3.. But the state Supreme Court assuredly *did not* "properly state," Opp.22, let alone perform the scrutiny *Ward* prescribed. The decision nowhere mentioned what that opinion said is "*the essence*" of a reviewing court's First Amendment responsibility: to determine whether the challenged statute pursues its purpose "*without *** significantly restricting a substantial quantity of speech that does not create the *** evils*" at which it is directed. 491 U.S. at 799 (emphasis added). Accord *Frisby* v. *Schultz*, 487 U.S. 474, 485-486 (1988) (ban not "narrowly tailored" if "substantive evils" are only a "possible byproduct of the activity [proscribed]") (quoting *Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

The State also steers clear of that inquiry, hewing to the court's upside-down "tailoring" approach. And for understandable reasons: the "evils" Section 202.5 seeks to address are, on the State's own reckoning, only a "possible byproduct" of forbidden "accessing"; and, as courts that have *actually* applied this settled standard have concluded, laws like Section 202.5 punish vast quantities of protected activity "completely unrelated [to]" contacting (or gathering information) about minors. *Doe* v. *Nebraska*, 898 F. Supp. 2d 1086, 1111 (2012).

Section 202.5 bears no resemblance to the "preventative measures" upheld in the cases the State cites (Opp.28). The measure *Ward* approved restricted the challengers' activities only insofar as necessary for other park-goers' quiet enjoyment. No teenage internet user is harmed when a registrant shares good news with his Facebook "friends" or

follows the White House Twitter feed. Section 202.5 is as "tailored" as a "buffer zone" barring individuals from all New York City out of concern they might play loud music in Central Park.

4. Nor does the Opposition remedy the decision's failure to investigate more sensitive means of achieving the law's purposes—the overriding theme of this Court's intermediate scrutiny decision in *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2537-2540 (2014)—saying only that government should not be limited to measures operating after "damage is already done," Opp.28. But petitioner recognized that "nothing confines the State to punishing completed misconduct," Pet.21, identifying multiple, less burdensome *preventative* measures. *Id.*

a. The State is most tellingly silent about the alternative this Court's case law most strongly supports: inclusion of an offense element that "separate[es] legal innocence from wrongful conduct," *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015). As in *Elonis*, accessing a social networking website to "communicat[e] [or learn] *something*" is not, on the State's description, "what makes the conduct 'wrongful.'" 135 S. Ct. at 2011. Indeed, a more focused law would address malevolent "information gathering" by persons with no previous registrable conviction.

b. The State ventures no explanation for the legislature's *deletion* of a provision imposing obligations on site operators and teenage users' parents, see Pet.3, except that such measures aren't 100% effective. But self-protective measures, however imperfect, play an important role in First Amendment analysis, see *Reno* v. *ACLU*, 521 U.S.

844, 877 (1997). (The agreements the State touts, see Opp.23 & n.6, mandate privacy settings preventing under-16 users' profile information from being viewable by adults).

5. The State's claims about still-open "channels of communication" fundamentally misunderstand what the First Amendment protects and Section 202.5 burdens. See Law Prof. Amicus Br. 4-12.

a. It may be true (Opp.36 n.10) that the court proffered pauladeen.com only as a rejoinder to petitioner's assertion of exclusion from foodnetwork.com. But neither the decision below nor the State has offered *any* alternative to the sites—including Facebook, Twitter, LinkedIn, and YouTube—at the statute's core. Those sites, unlike, *e.g.*, email blasts (Opp.35), provide "channels" for activities—including interacting across family, social, professional, and interest networks and obtaining news, information, and entertainment content—no less protected under the First Amendment than person-to-person communication or simply speaking one's piece. If "[b]anning access to Facebook cannot be compared to" the prohibition invalidated in *Ladue* v. *Gilleo*, 512 U.S. 43 (1994), Opp.37, that is because expression through yard signs, as important as it remains, plays a much *narrower* role in the Nation's public discourse than do the activities that occur daily on the sites Section 202.5 proscribes.

b. The State, unable to identify any plausible substitute for these dominant social media sites, belabors a tertiary point—whether sites like nytimes.com are proscribed. The State insists they are not banned—because they do not provide user profiles that "link[] to other personal Web pages," a

"hallmark" of a "social networking site," that appears in the statutory definition, with the "conjunctive 'and,' rather than 'or.'" Opp.30, 31 & n.8.

The state Supreme Court did not adopt that construction; it assumed that the prohibition *does* apply to the New York Times. And the "natural" meaning (Opp. 31) of a term is irrelevant when the statute itself supplies a definition. See *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 96 (1935). The State's "textual" argument is just wrong: In *this* provision, "and" connects enumerated characteristics introduced by "*such as* * * *," meaning that *no one* is required, let alone all. See *Donovan* v. *Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981).

c. In its waning pages, the Opposition asserts, remarkably, that petitioner would not have run afoul of Section 202.5 had he asked a friend to access Facebook, post his "God is great" comment, "and directly attribute the message to [petitioner]." Opp.35. This late-breaking "alternative" unravels the State's principal arguments: If that means of expression is outside Section 202.5's ambit, then, a registrant presumably may have a friend gather and print profile information about members of a high school cheerleading squad—even while North Carolina continues to punish as felons persons accessing sites themselves for no other purpose than to follow current events.

III. This Court's Intervention Is Needed

Much of the Opposition is devoted to deflecting the lower court decisions petitioner cites, including the ("only three" Opp.13) federal court decisions to consider—and invalidate—state social media bans.

The State assures that all are "distinguishable," *id.*; some conflict only with this decision's *"reasoning," id.*; and others exhibit "tension" *id.*20, not "meaningful conflict." *Id.*2. From this—and the fact that Section 202.5 is "little copied," the State invites the Court to conclude there is "no pressing need for * * * intervention" "for the moment." *Id.*20.

1. As the petition explained, however, the need here derives first from stark conflicts with *this Court's* foundational precedents, see S. Ct. R. 10(c), and the intolerable First Amendment consequences of permitting the decision to stand, regardless whether other jurisdictions follow suit. See *Near* v. *Minnesota*, 283 U.S. 697, 707 (1931) (statute, while "unusual, if not unique" "raise[d] questions of grave importance transcending the local interests involved in the particular action").

2. The state statute here has far graver real-world significance than federal ones this Court's has recently reviewed. Section 202.5 remains aggressively enforced—in more than 1,000 felony prosecutions—and relegates to second-rate speech rights tens of thousands of citizens under no criminal justice supervision. Compare Br. Opp., *United States* v. *Alvarez*, No. 11-210, at 14-15 (statute enforced fewer than 50 times); Br. Opp., *United States* v. *Stevens* No. 08-769, at 8 (no "[]other ruling by any court addressing [provision's] constitutionality"); cf. Pet. for Cert., *Schwarzenegger* v. *Video Software Dealers Ass'n*, No. 08-1488, at 5 n.1 (acknowledging absence of conflict).

3. The Opposition's hair-splitting distinctions do not withstand scrutiny in any event. The other social media bans were not "far broader," Opp.14; the

statute in *Doe* v. *Nebraska*, unlike this one, did not criminalize "[m]erely accessing a site to read * * * content on a page," 898 F. Supp. 2d at 1114. And the grounds for invalidation in *Marion County* had nothing to do with the fact that "chat rooms" were covered. Rather, Indiana's law failed because, like this one, it criminalized vast amounts of speech unrelated to the State's interest. See 705 F.3d at 699.

Though *Doe* v. *Nebraska* was a district court decision, see Opp.16, it was the unusual one where a State did not even appeal a facial invalidation. And while the Opposition (at 15) trumpets language in *Marion County* declining to prejudge rationales not before that court, the decision expressed constitutional doubts about the hypothetical, prophylactic approach, see 705 F.3d at 701 & n.6. Indiana (presumably no less concerned about its teenagers' safety than North Carolina) responded accordingly: It replaced its sweeping law with one requiring parolees to submit to searches of their internet devices. See Ind. Code § 11-8-8-8.

IV. Petitioner's Case Is A Strong Vehicle

None of the sundry case-specific "flaws" (Opp.22) the Opposition throws up obscures that petitioner's case is a highly suitable "vehicle" for deciding Section 202.5's constitutionality.

1. The State first highlights that Facebook.com is "clearly covered" by Section 202.5 meaning, it says, that the statute's unconstitutional vagueness will "not excuse [petitioner's] behavior." Opp.22,23. But petitioner's principal claim is not that Section 202.5 proscribes Facebook with insufficient clarity, rather that the "behavior" underlying his conviction—using

that site without malevolent intent and causing no harm—is not *proscribable*. See *De Jonge*, 299 U.S. at 365 ("[P]eaceable assembly for lawful discussion cannot be made a crime."). No "prudential" rule prevents persons who "clearly" violate unconstitutional laws from challenging them. The fact that petitioner's conviction was not infected with *all* this law's defects—and that neither his guilt nor his constitutional claim turns on how the statute's many imprecise terms are construed—makes this a better candidate for review.

2. The State's attempt to conjure a "prudential" objection from account registration "responsibilities" on the Facebook website (Opp.23) is the reddest of herrings. The quoted language (or the 2010 version, if there was one) had no role in petitioner's conviction or the decision upholding it. Section 202.5 does not purport to impose punishment for breaching contractual "terms of use," and the State has never disputed that accessing sites welcoming registrants as users (including, apparently, Twitter and YouTube) is prohibited.

Plainly, the government's power does not extend to punishing all activity "unlawful" under a private contract. *Facebook* may impose restrictions, enforceable through account deactivation that no State could. See Pet.25 (noting restrictions on "sensational," and "disrespectful" material); cf. *Elonis*, 135 S. Ct. at 2013 (vacating conviction for hate-filled Facebook speech); *Bouie* v. *City of Columbia*, 378 U.S. 347, 358 (1964) ("It is one thing to say that a person remaining on another's land after being told to leave may be * * * sued in a civil action,

and quite another to say he may be convicted and punished as a criminal").

What the State (Opp.24) finds "strange"—that the Constitution restrains punishment of speech that a person has no "independent lawful right to make"—is the longstanding First Amendment rule. *R.A.V.* v. *Saint Paul*, 505 U.S. 377 (1992), overturned a conviction for uttering unprotected "fighting words," and *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam), reversed a conviction for leafleting on a military base, though "[i]t was never doubted that a military commander [could] generally restrict access." *City of Lakewood* v. *Plain Dealer Pub. Co.*, 486 U.S. 750, 766 (1988).

3. The Opposition's welter of confusing—and confused—arguments about petitioner's facial challenge fare no better. Whether petitioner's conviction is reversed because Section 202.5 is unconstitutional facially or as-applied to cases like his is of modest import; the anti-desecration law in *Texas* v. *Johnson*, 491 U.S. 397 (1989), was held invalid only "as applied" to expressive flag burning (the Court reserved whether a conviction for dragging the flag out of laziness could stand, *id.* at 404). And though Section 202.5 *is* manifestly overbroad, irrespective of uncertainties as to particular websites or offender categories, petitioner's facial challenge *does not* require that doctrine's "strong medicine." Far from conceding that he falls within Section 202.5's "plainly legitimate sweep," petitioner's central claim is that convictions for "accessing" Facebook and foodnetwork.com are equally impermissible (at least absent proof, which *the statute does not require*, of wrongful intent or actual harm). "[I]n all its

applications [Section 202.5] * * * operates on a fundamentally mistaken premise." *Sec'y of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984).

Conclusion

The petition for writ of certiorari should be granted.

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RECORD
AND
BRIEFS

No. 15-1194

In the Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the North Carolina Supreme Court

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QUESTION PRESENTED

Whether a law banning convicted sex offenders who have served their sentences and are no longer on probation from accessing major social networking websites—such as Facebook, LinkedIn, and Twitter—leaves open ample alternative channels of communication.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. All parties have consented to the filing of the brief.

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Amici have written extensively on First Amendment issues. All are concerned that the decision below, and other circuit decisions identified in this brief

sharply deviate from this Court's precedent and risk eroding the rigor of this Court's "ample alternative channels" analysis. *Amici* believe that their perspective as scholars can be of help to this Court in evaluating the Petition for Certiorari.

SUMMARY OF ARGUMENT

N.C. Gen. Stat. Ann. § 14-202.5 bans convicted sex offenders from accessing a vast range of social networking sites—sites that have become indispensable places for speech about family life, politics, and religion. Yet the North Carolina Supreme Court upheld the law on the grounds that it supposedly left open "ample alternative channels." Pet. App. 18a.

True, the court acknowledged, the statute banned access to Facebook and the like. *Id.* at 19a. The dissent also noted that the statute banned access to LinkedIn, Instagram, Reddit, Myspace, and the *New York Times* Web site. *Id.* at 32a. But, the court argued, the statute left open access to other social networking websites:

- The Paula Deen Network, a site that lets registered users to swap recipes and discuss cooking techniques;
- WRAL.com, the site of a local TV station;
- Glassdoor.com, an online job searching tool;
- Shutterfly.com, a photo-sharing website.

Id. at 17a. This looks more like a parody of the "ample alternative channels" analysis than a serious application of that analysis.

Indeed, this government-friendly approach to the "ample alternative channels" inquiry is sharply inconsistent with this Court's most recent precedent on the matter, *City of Ladue* v. *Gilleo*, 512 U.S. 43 (1994). It is also inconsistent with circuit court cases that have taken seriously the requirements that the alternatives indeed be "ample." *See* Part II.A (discussing such cases from the Second, Sixth, Seventh, Ninth, and D.C. Circuits).

Unfortunately, though, the North Carolina court is not alone in interpreting the "ample alternative channels" prong so feebly. Perhaps because of the subjectivity of the term "ample," some federal circuit court cases have similarly departed from this Court's teachings in *City of Ladue*, and from the other circuit court decisions we cite above. *See* Part II.B. This Court ought to grant review to provide lower courts with more guidance about how demanding the "ample alternative channels" analysis should be.

ARGUMENT

I. This Case Offers This Court an Opportunity to Clarify the Jurisprudence Regarding "Ample Alternative Channels"

A. The North Carolina Statute Bars Access to Some of the Most Important Venues for Online Speech

Section 14-202.5 prohibits a registered sex offender from knowingly "access[ing]" any "commercial social networking Web site" (with narrow exceptions) that "permits minor[s]" "to become members or to create * * * personal Web pages." N.C.G.S. § 14-

202.5. This bars people from reading a vast range of speech, and sharply limits their ability to reach a vast potential audience with their own speech.

Packingham was convicted for accessing Facebook. As of 2014, 71% of online American adults used Facebook,[2] which amounted to 189 million monthly users.[3] The same year, Facebook had almost 1.5 billion users worldwide who accessed the site at least monthly, a number equal to half of the world's online users.[4]

Likewise, 28% of online adults in the United States use LinkedIn, another website covered by § 14-202.5.[5] LinkedIn is a prominent professional networking platform that lets users create profiles showing their professional background and connect with each other, recruiters, and businesses. Access to LinkedIn can significantly enhance a registered sex offender's chances of obtaining a job. A 2013 study found that 77% of employers used social media net-

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[2] *See* Maeve Duggan et al., *Social Media Update 2014*, PEW RESEARCH CENTER (2015), http://www.pewinternet.org/files/2015/01/PI_SocialMediaUpdate20144.pdf.

[3] *See* Ashley Parker, *Facebook Expands in Politics, and Campaigns Find Much to Like*, N.Y. TIMES, July 29, 2015.

[4] See Katie Hope, *Facebook Now Used by Half of World's Online Users*, BBC NEWS, July 29, 2015.

[5] *See* Duggan, *supra* note 2.

works to recruit candidates.[6] Of those using social media, 94% said they used LinkedIn.[7]

An equal percentage of online U.S. adults (28%) reported using Pinterest, another social networking website designed to help users create a virtual bulletin board of clothing, art projects, furniture, and the like that the user finds interesting.[8] Each "pin" is linked to retail websites where the user can purchase whatever caught his eye.

Likewise, 26% of online U.S. adults reported using Instagram, another popular social media platform that allows users to post photos.[9] Another 23% of online adults use Twitter, which allows users to publish short items to readers who have subscribed to the user's Twitter account.[10] Section 14-202.5 bans access to all of these popular social media websites.[11]

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[6] Sarah Halzack, *LinkedIn Has Changed the Way Businesses Hunt Talent*, WASH. POST, Aug. 4, 2013.

[7] *Id.*

[8] *See* Duggan, *supra* note 2.

[9] *See id.*

[10] *See id.*

[11] Like Facebook, LinkedIn, Pinterest, and Twitter are accessible to users under the age of 18 in the United States. *See User Agreement*, LINKEDIN, https://www.linkedin.com/legal/user-agreement (last visited Apr. 19, 2016) (minimum age 14); *Terms of Service*, PINTEREST, https://about.pinterest.com/en/terms-service (last visited Apr. 19, 2016) (minimum age 13); *Twitter Privacy Policy*, TWITTER, https://twitter.com/privacy (last visited Apr. 19, 2016) ("Our Services are not directed to persons under 13."). LinkedIn does not fall within

The statute thus criminalizes a wide variety of speech to and from the many tens of millions of Americans who make regular use of these sites.

And sites such as Facebook and Twitter have become a prominent and uniquely effective form of communication for which there is virtually no equivalent substitute. Facebook lets users as speakers communicate quickly and effectively with friends and family, sharing personal thoughts, political ideas, and news stories. According to a 2014 survey conducted by the Pew Research Center, 61% of millennials reported getting news about politics and government in the previous week from Facebook.[12]

Facebook also lets users as readers get a wide range of information that originates or first becomes widely spread on Facebook. To offer one especially famous example, in 2011, a video of Tunisian merchant Mohamed Bouazizi's self-immolation reached the world as it "hopped across hundreds of Facebook

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the statutory exception for a site that "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors," § 14-202.5(c)(2); people use LinkedIn to build professional networks, and not to directly engage in commercial transactions (the way that, for instance, Yelp and eBay are used for commercial transactions). *See* Pet. App. 33a (dissenting opinion) (noting that the statute "clearly includes" LinkedIn).

[12] Amy Mitchell et al., *Facebook Top Source for Political News Among Millennials*, PEW RESEARCH CENTER (2015), http://www.journalism.org/2015/06/01/facebook-top-source-for-political-news-among-millennials/.

pages," helping give rise to what came to be known as the Arab Spring.[13] Many such videos may remain available only on Facebook, without being copied to other sites. The North Carolina statute makes it a crime for sex offenders to even "access" Facebook. N.C. Gen. Stat. § 14-202.5(a).

Likewise, social media has become a staple of U.S. election campaigns. During the 2012 election, both the Republican National Committee and President Obama's re-election campaign created their own Facebook apps that let users get information about the campaign, interact with other candidate supporters, and even make phone calls on behalf of the candidate from the comfort of their own homes.[14] The Obama campaign also created a special app designed to target young swing-state voters.[15]

Other social media sites likewise let users engage with the political process. Senator Rand Paul, for instance, promoted his filibuster of the USA Patriot Act using Twitter.[16] Likewise, Senator Ted Cruz read

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[13] Marc Fisher, *In Tunisia, Act of One Fruit Vendor Sparks Wave of Revolution Through Arab World*, WASH. POST, Mar. 16, 2011.

[14] Sara Burnett, *GOP, Democrats Take Political Scrap Online*, DENVER POST, May 28, 2012.

[15] Michael Scherer, *Friended: How the Obama Campaign Connected with Young Voters*, TIME MAG., Nov. 20, 2012.

[16] *See* Parker, *supra* note 3.

Twitter messages on the floor of the Senate in March 2013.[17]

Local governments and public officials are also establishing official Facebook pages for cities and city departments, recognizing the social media giant's power to grant them access to constituents at little or no cost.[18] Section 14-202.5 bars people from accessing any of this crucial information, much of which can only be found on Facebook or on other social media sites covered by the statute.

B. The Lower Court's Analysis Is Inconsistent with This Court's Handling of Ample Alternative Channels in *City of Ladue*

In *City of Ladue*, 512 U.S. at 45, this Court invalidated an ordinance that it treated as a total ban on homeowners displaying signs on their property. The ordinance, this Court concluded, did not leave open "adequate substitutes" for the important medium of speech that it foreclosed. *Id.* at 56.

The city argued that the ordinance left people "free to convey their desired messages by other

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[17] *Cruz Puts Twitter in Spotlight on Senate Floor*, WALL ST. J., Mar. 7, 2013; *see also* Joanna Raines, *Ted Cruz Brings Twitterverse to Senate Floor for the First Time in History*, HOUS. CHRON., Mar. 7, 2013.

[18] *See, e.g.*, Boise, Idaho Police Dep't, https://www.facebook.com/BoisePoliceDepartment/ (last visited Apr. 18, 2016); Chattanooga, Tenn., https://www.facebook.com/Chattanooga.gov (last visited Apr. 18, 2016); Montpelier, Vt., https://www.facebook.com/MontpelierVT/ (last visited Apr. 18, 2016).

means, such as hand-held signs, 'letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.'" *Id.* at 56 (citation omitted, italics deleted). But these alternatives, this Court held, were inadequate because they tended to convey a substantively different message, were not as cost-effective, or failed to reach the speaker's intended audience.

Section 14-202.5 similarly violates the First Amendment, because it does not leave open adequate alternative channels of communication. The court below erred in holding otherwise.

As alternatives, the court below suggested "the Paula Deen Network, a commercial social networking Web site that allows registered users to swap recipes and discuss cooking techniques"; the TV station website WRAL.com, a mainstream media outlet for news; "the commercial social networking Web site Glassdoor.com," which could potentially allow a sex offender to search for jobs online; and the web site Shutterfly, which lets people share photographs. Pet. App. 17a. The court further observed that the statute did not restrict "such methods of communication as text messages, FaceTime, electronic mail, traditional mail, and phone calls, which are not based on use of a Web site." *Id.* at 18a.

But these alternatives do not even come close to letting people express themselves as effectively as they can on Facebook, Twitter, and similar sites, or letting people read the material available on such sites. Like in *City of Ladue*, there is no adequate al-

ternative to the communicative impact of the forbidden social media.

Social media is "an unusually cheap and convenient form of communication," *City of Ladue*, 512 U.S. at 57, which lets people easily communicate with large audiences. *Id.* Many social media sites, including Facebook, Twitter, Pinterest, and Instagram, are free for ordinary users. And communicating through such sites is also extraordinarily convenient.

Facebook, for instance, makes it easy to share your posts on other social media pages. It automatically promotes your post to your friends; blogs do not. It lets friends easily comment on the posts. And it lets people communicate with their friends in a way that is not unduly intrusive. Someone who e-mails posts each day to hundreds of friends will soon find himself with many fewer friends; posting the same items on Facebook is much less distracting to recipients.

The Paula Deen Network and the other alternative sites proposed by the court below fall far short of reaching the kind of audience that Facebook or Twitter are able to reach. To reach your friends and acquaintances through a social media site, they need to be on that site; many fewer people are on the Paula Deen Network than on Facebook. As in *City of Ladue*, the restriction interferes with a speaker's ability to reach "an audience that could not be reached nearly as well by other means." *Id.*

And the alternatives offered by the court below also interfere with people's ability to read the content they want to read. The personal, political, and reli-

gious content a user seeks to access by using Facebook cannot be found on a recipe website.

As this Court made clear in *City of Ladue*, the mere fact that alternate methods of communication exist does not mean that these channels are "ample alternative channels," which is to say "adequate substitutes" for the channels that are forbidden. *Id.* at 56-57. And there is no adequate substitute for the social media giants foreclosed by § 14-202.5. The decision of the court below cannot be reconciled with this Court's ruling in *City of Ladue*.

II. This Case Would Let This Court Resolve a Disagreement Among Lower Court Decisions About How "Ample Alternative Channels" Should Be Understood

The North Carolina court's weak reading of the "ample alternative channels" requirement is a symptom of a broader problem: Lower court decisions have split on how this requirement should be understood.

A. Many Circuit Court Decisions Have Applied the "Ample Alternative Channels" Requirement Rigorously

Many circuit court decisions rigorously analyze whether the proposed alternative channels are ample (or adequate), and conclude that they are not ample or adequate if they do not let speakers reach substantially the same audience. For example:

1. The Seventh Circuit has expressly stated that an alternative channel "is not adequate if it 'foreclose[s] a speaker's ability to reach one audience even if it allows the speaker to reach other groups.'" *Wein-*

berg v. *City of Chicago*, 310 F.3d 1029, 1041 (7th Cir. 2002) (quoting *Gresham* v. *Peterson*, 225 F.3d 899, 907 (7th Cir. 2000)). Because of this, the Seventh Circuit struck down a Chicago ordinance that banned selling merchandise—such as books—on certain city sidewalks, including in front of the Chicago Blackhawks hockey stadium. The ban, the court held, failed to leave open "ample alternative channels" for communication, because the plaintiff's intended audience consisted of Blackhawks fans, and selling plaintiff's book online, at bookstores, or in other areas of the city would not as effectively reach that audience. *Id.* at 1041, 1042.

2. The Ninth Circuit has likewise concluded that "an alternative is not ample if the speaker is not permitted to reach the intended audience." *Bay Area Peace Navy* v. *United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (reaffirmed after *City of Ladue* in *Long Beach Area Peace Network* v. *City of Long Beach*, 574 F.3d 1011, 1025, 1038 (9th Cir. 2008)). In *Bay Area Peace Navy*, the government established a 75 yard "security zone" around Aquatic Park Pier in which only invited guests were allowed during "Fleet Week," an event that included a naval vessel parade. *Id.* at 1225-26. The Peace Navy, which used small boats for an anti-war counter-demonstration during Fleet Week, challenged the security zone on First Amendment grounds. *Id.* at 1226-27.

The Ninth Circuit found that the zone around the pier did not leave the Peace Navy with ample alternative channels of communication, because it kept the Peace Navy's message from reaching the government's invited guests on the pier. *Id.* at 1230. The al-

ternatives of "passing out pamphlets on land or demonstrating at the entrance to the pier," the court concluded, were inadequate, because the invited guests could not see any message conveyed from those positions. *Id.* at 1229.

3. In *Cleveland Area Bd. of Realtors* v. *City of Euclid*, 88 F.3d 382 (6th Cir. 1996), the Sixth Circuit struck down a city ordinance that largely limited signs in residential neighborhoods to three or four square feet, and required that they be placed in windows rather than on lawns. *Id.* at 383-84. The court treated the ordinance as content-neutral, but concluded that it did not leave open ample alternative channels for communication. *Id.* at 387-88, 390.

The proffered alternatives—such as the use of real estate agents, newspaper advertisements, or window signs—were inadequate, the court held. Real estate agents were "considerably more expensive" than "for sale" yard signs. *Id.* at 390. Window signs were "'completely ineffective,'" *id.* (quoting the district court decision), and thus "greatly restrict a speaker's audience." *Id.* (The court presumably concluded that window signs were ineffective because they were so hard to see, the reason given by the district court decision. *Cleveland Area Bd. of Realtors* v. *City of Euclid*, 833 F. Supp. 1253, 1260 (N.D. Ohio 1993).).

4. In *Initiative & Referendum Institute* v. *U.S. Postal Service*, 417 F.3d 1299 (D.C. Cir. 2005), the D.C. Circuit held that a regulation banning "soliciting signatures on petitions, polls, or surveys" on all postal service property would be unconstitutional as to exterior sidewalks that were traditional public fo-

ra. *Id.* at 1303, 1314. The regulation, the court concluded, failed to leave open "ample alternative channels" for communication, *id.* at 1302, 1312—the ban on signature solicitation significantly "'limit[ed] the size of the audience'" a person could reach, *id.* at 1312 (citation omitted).

5. In *Bery* v. *City of New York*, 97 F.3d 689 (2d Cir. 1996), the Second Circuit struck down a provision of New York City's administrative code that "bar[red] visual artists from exhibiting, selling or offering their work for sale in public places in New York City without first obtaining a general vendors license." *Id.* at 691. The ordinance, the court held, failed to leave open ample alternative channels of communication. *Id.* at 698.

Though the city argued that the plaintiffs could sell their artwork from their homes or from galleries or museums, *id.*, the court concluded that displaying art on the street reached a different audience (people who do not attend galleries or museums). *Id.* at 698. "Appellants are interested in attracting and communicating with the man or woman on the street who may never have been to a gallery and indeed who might never have thought before of possessing a piece of art until induced to do so on seeing [plaintiffs'] works." *Id.* "The sidewalks of the City must be available for [plaintiffs] to reach their public audience." *Id.*

B. Other Court Decisions, Including the Decision Below, Treat Even Much Inferior Channels as "Ample Alternatives"

Other court decisions, on the other hand, have departed from the principles of *City of Ladue* and of the circuit decisions discussed above, by concluding that ample alternative channels exist even when the alternatives block speakers from reaching much of their target audiences.

1. In *Marcavage* v. *City of New York*, 689 F.3d 98 (2d Cir. 2012), the city relegated protesters at the 2004 Republican National Convention to a demonstration zone that "was not within 'sight and sound' of the intended audience" of convention delegates. *Id.* at 102, 108. The Second Circuit held that this zone was an "ample alternative" to demonstrating in front of the Convention, even though the protesters were placed too far for the delegates to hear. The court specifically rejected the analysis of the Ninth Circuit in *Bay Area Peace Navy*, noting that the Ninth Circuit's decision was "not persuasive," and was "a split decision from another circuit." *Id.* at 108 n.2.[19]

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[19] The Second Circuit also concluded that the *Bay Area Peace Navy* ample alternative analysis was "dictum," because the Ninth Circuit had also concluded that "the speech restriction was not narrowly tailored." *Marcavage*, 689 F.3d at 108 n.2. But the Ninth Circuit has held that alternative holdings are not dictum. *See Best Life Assur. Co. of California* v. *C.I.R.*, 281 F.3d 828, 833 (9th Cir. 2002). And the *Bay Area Peace Navy* ample alternative channels analysis was an example of such an alternative holding. The Ninth Circuit concluded that the gov-

2. In *Jacobs* v. *Clark County School Dist.*, 526 F.3d 419 (9th Cir. 2008), the Ninth Circuit upheld school uniform policies that prohibited students from displaying printed messages on their school clothing. *Id.* at 422-27, 437. In *Jacobs*, the Ninth Circuit did not apply any special rule for schools, for instance the rule of *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). Instead, the court applied the normal intermediate scrutiny standard applicable to "law[s] restricting speech on a viewpoint- and content-neutral basis" outside school. *Jacobs*, 526 F.3d at 429-34.

And the restriction, the court concluded, left open ample alternative channels: students could still express themselves via "verbal conversations," through the school newspaper, by joining student clubs, and by wearing whatever they wanted after school and on weekends. *Id.* at 437. Yet the clothes one wears outside school cannot reach the same audience that one has in school. Likewise, one can only have verbal conversations with a few people; a T-shirt can be seen by many more. And many students who do not read the school newspaper or join student clubs can still see messages on T-shirts.

3. As Part I noted, the North Carolina Supreme Court's opinion applies the "ample alternative chan-

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ernment-established 75-yard "security zone" in question was not narrowly tailored, but "also agree[d]" with the district court that this security zone did not leave open ample alternative channels for communication. *Bay Area Peace Navy*, 914 F.3d at 1228-30.

nels" prong in an even more government-friendly manner than do *Marcavage* and *Jacobs*.

All these cases would have come out differently under the analysis of the cases discussed in Part II.A. The restrictions upheld in *Marcavage*, *Jacobs*, and the decision below "'foreclose[d] a speaker's ability to reach [his chosen] audience,'" *Weinberg*, 310 F.3d at 1041 (citation omitted). They did "not permit[the speaker] to reach the 'intended audience,'" *Bay Area Peace Navy*, 914 F.2d at 1229. They "greatly restrict[ed] a speaker's audience," *Cleveland Area Bd. of Realtors*, 88 F.3d at 390. They significantly "'limit[ed] the size of the audience'" a person could reach, *Initiative & Referendum Institute*, 417 F.3d at 1312 (citation omitted). And they failed to allow the speakers "to reach their public audience," *Bery*, 97 F.3d at 698.

C. This Disagreement Merits This Court's Attention

The head count of the positions taken by these courts is complicated. The Sixth, Seventh, and D.C. Circuits hold that alternative channels are ample only if they let a speaker reach essentially the same audience. The North Carolina Supreme Court holds that they are ample even when they reduce the speaker to a tiny fraction of his potential audience. And the Second and Ninth Circuits have precedents going both directions, without confronting the disagreements among the precedents. (The Second Circuit's speech-restrictive *Marcavage* decision does not discuss the speech-protective ample alternative channels analysis in *Bery*, and the Ninth Circuit's

speech-restrictive *Jacobs* decision does not discuss the speech-protective ample alternative channels analysis in *Bay Area Peace Navy*.)

But the disagreements both among and within circuits reflect the need for this Court to step in. The "ample alternative channels" test is, understandably, not self-defining. When "the meaning of [such] concepts cannot be adequately expressed in a simple statement," and yet such concepts are of constitutional significance, "this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984). Inconsistent interpretations of this Court's precedents, such as in the lower court decisions identified in this Part, signal that it is time for this Court to offer more benchmarks for lower courts to follow in this important area of First Amendment law.

CONCLUSION

The court below essentially refused to apply the "ample alternative channels" requirement in any meaningful way. In this respect, its decision was an extreme version of some circuit court decisions, and inconsistent with other circuit court decisions and with this Court's decision in *City of Ladue*. This Court should grant certiorari and remind lower courts that the "ample alternative channels" requirement should be robustly applied.

Respectfully submitted,

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AND
BRIEF

No. 15-1194

IN THE

Supreme Court of the United States

LESTER GERARD PACKINGHAM, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari
to the Supreme Court of
North Carolina

JOINT APPENDIX

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The following opinions and statute have been omitted in printing this Joint Appendix because they appear at the following pages in the appendix to the Petition for a Writ of Certiorari:

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N.C. Gen. Stat. § 14-202.5 ..... 66a

STATE OF NORTH CAROLINA
DURHAM COUNTY, SUPERIOR COURT DIVISION

State of North Carolina v. Lester Gerard Packingham
File No. 10-CRS-57148

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
07/23/2010	North Carolina, Durham County, General Court of Justice, District Court Division. Warrant for Arrest.
09/20/2010	North Carolina, Durham County, General Court of Justice, Superior Court Division. Indictment.
12/09/2010	North Carolina, Durham County, General Court of Justice, Superior Court Division. Motion to Dismiss Charges Against Lester Gerard Packingham for Unconstitutionality of Statute, File No. 10-CRS-57148.
12/30/2010	North Carolina, Durham County, General Court of Justice, Superior Court Division. Motion to Declare N.C. Gen. Stat. § 14-202.5 Unconstitutional in the Case of Christian Martin Johnson, File 10-CRS-57146.
04/05/2011	North Carolina, Durham County, General Court of Justice, Superior Court Division. Motion Hearing Exhibits.

04/19/2011	North Carolina, Durham County, General Court of Justice, Superior Court Division. Order on Defendants' Motions to Dismiss.
05/28/2012	North Carolina, Durham County, General Court of Justice, Superior Court Division. Trial Exhibits.
05/29/2012	North Carolina, Durham County, General Court of Justice, Superior Court Division. Stipulation by Parties for Trial as to Underlying Crime.
05/29/2012	North Carolina, Durham County, General Court of Justice, Superior Court Division. Stipulation by Parties for Trial as to Acknowledgment of Registry Obligations and Attachments.
05/30/2012	North Carolina, Durham County, General Court of Justice, Superior Court Division. Verdict.
05/30/2012	North Carolina, Durham County, General Court of Justice, Superior Court Division. Notice of Appeal.
06/07/2012	North Carolina, Durham County, General Court of Justice, Superior Court Division. Transcript of Motions Hearing, April 5-7, 2011.
07/31/2012	North Carolina, Durham County, General Court of Justice, Superior Court Division. Transcript of the Trial, May 29-30, 2012.

NORTH CAROLINA COURT OF APPEALS

State of North Carolina v. Lester Gerard Packingham
Case No. COA12-1287
Durham County No. 10-CRS-17148

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
10/25/2012	1	RECORD FOR: Defendant-Appellant Packingham, Lester Gerard BY: Mr. G. Glenn Gerding LAW OFFICE OF GLENN GERDING
12/10/2012	3	APPELLANT BRIEF FOR: Defendant-Appellant Packingham, Lester Gerard BY: Mr. G. Glenn Gerding LAW OFFICE OF GLENN GERDING
03/14/2013	7	APPELLEE BRIEF FOR: BY: Mr. David Elliott N.C. DEPARTMENT OF JUSTICE
05/16/2013	8	MEMOS FOR: Defendant-Appellant Packingham, Lester Gerard BY: Mr. G. Glenn Gerding LAW OFFICE OF GLENN GERDING

5/16/2013	9	**MEMOS** **FOR:** **BY: Mr. David Elliott** **N.C. DEPARTMENT OF JUSTICE**
05/20/2013	10	**MEMOS** **FOR: Defendant-Appellant** **Packingham, Lester Gerard** **BY: Mr. G. Glenn Gerding** **LAW OFFICE OF GLENN GERDING**

IN THE SUPREME COURT OF NORTH CAROLINA

State of North Carolina v. Lester Gerard Packingham

No. 366PA13

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
08/23/2013	BL-1	APPLICATION FOR TEMPORARY STAY (Allowed) - 08-26-2013; FOR: Appellant State of North Carolina; BY: Ms. Anne M. Middleton; N.C. DEPARTMENT OF JUSTICE
08/23/2013	BL-2	PETITION FOR WRIT OF SUPERSEDEAS (Allowed) - 11-07-2013; FOR: Appellant State of North Carolina; BY: Ms. Anne M. Middleton; N.C. DEPARTMENT OF JUSTICE
09/24/2013	BL-3	NOTICE OF APPEAL BASED UPON A CONSTITUTIONAL QUESTION (Dismissed) - 11-07-2013; FOR: Appellant State of North Carolina; BY: Ms. Anne M. Middleton; N.C. DEPARTMENT OF JUSTICE
09/24/2013	BL-4	PETITION FOR DISCRETIONARY REVIEW (Allowed) - 11-07-2013; FOR: Appellant State of North Carolina; BY: Ms. Anne M. Middleton; N.C. DEPARTMENT OF JUSTICE

10/02/2013	BL-5	RESPONSE TO PETITION FOR DISCRETIONARY REVIEW; BY: Mr. G. Glenn Gerding; LAW OFFICE OF GLENN GERDING
10/02/2013	BL-6	MOTION TO DISMISS APPEAL (Allowed) – 11-07-2013; FOR: Defendant-Appellee Packingham, Lester Gerard; BY: Mr. G. Glenn Gerding; N.C. APPELLATE DEFENDERS OFFICE
01/13/2014	BL-8	APPELLANT BRIEF; FOR: Appellant State of North Carolina; BY: Ms. Anne M. Middleton; N.C. DEPARTMENT OF JUSTICE
03/14/2014	BL-10	APPELLEE BRIEF; FOR: Defendant-Appellee Packingham, Lester Gerard; BY: Mr. G. Glenn Gerding; N.C. APPELLATE DEFENDERS OFFICE
09/03/2014	BL-11	MEMOS; FOR: Defendant-Appellee Packingham, Lester Gerard; BY: Mr. G. Glenn Gerding; N.C. APPELLATE DEFENDERS OFFICE

11/26/2014	BL-12	MEMOS; FOR: Defendant-Appellee Packingham, Lester Gerard; BY: Mr. G. Glenn Gerding; N.C. APPELLATE DEFENDERS OFFICE
11/06/2015	BL-15	Opinion: Cert Date: 11-30-2015; Author: Honorable Robert H. Edmunds, Jr.; Decision: Reversed; Opinion Notes: Hudson, J dissenting with Beasley, J joining in this dissenting opinion Ervin, J did not participate in the consideration or decision of this case; Opinion Pages: 35; Opinion Cost: $ 7.00

COURT REPORTER'S TRANSCRIPT
April 5, 2011

State v. Johnson and Packingham

10-CRS-57146, 10-CRS-57148

Transcript of the proceedings taken in the General Court of Justice, Superior Court Division, Durham, North Carolina, at the April 5, 2011, Criminal Session, before the Honorable Michael Morgan, Judge Presiding.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

APPEARANCES

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* * *

[9:6]

THE COURT: All right. Defense Exhibit 2 is accepted into evidence.

All right, sir. You may come up to the witness stand.

WITNESS: Yes, sir.

Officer Brian Schnee, being first duly sworn, testifies as follows on direct examination conducted by Mr. Gerding:

Q Good morning.

A Morning, sir.

Q Could you please state your name for the record?

A Brian Schnee.

Q And where are you employed?

A I am employed with the City of Durham, specifically the Durham Police Department.

Q How long have you been in the police department?

A I was hired by the City of Durham October 2001. [10]

Q And what rank, what position do you hold?

A My rank within the Durham Police Department is a Corporal. The position I hold is one of two supervisors for the Durham Police Department Homicide Unit.

Q Is it appropriate for me to refer to you as Corporal?

A Whatever you prefer, sir.

Q Okay. Corporal, you said right now you're working on homicide cases?

A I was assigned as a supervisor with the Homicide Unit in August of 2010, sir.

Q Before that, what were your responsibilities as an officer?

A Prior to that, I was one of the two supervisors for the Durham Police Department Juvenile Investigative Unit, sir.

Q What were your responsibilities with that unit?

A Primary responsibilities? I reviewed all cases reported to the Durham Police Department or all incident reports written by Durham police officers involving juveniles, whether juveniles were the victims of an offense or juveniles were the suspects of the – of the offense that was indicated in the report, sir.

Q Were you an investigator, as well as a [11] supervisor?

A I was both, sir. I'm required to know what my investigators are doing, and I handled cases at the same time, sir.

Q Did you have an occasion to become involved in an investigation involving Christian Johnson?

A I did, sir.

Q And how did that investigation begin?

A Myself and my direct supervisor at the time, Sergeant Addison, assisted a – a report was made to the Durham Police Department where a registered sex

offender allegedly accompanied a[n] elementary school field trip to the zoo.

When that individual was arrested, he was on-line, accessing his Facebook account, according to the Sheriff's Department that arrested him.

I became intrigued or interested in seeing if there were any registered sex offenders in Durham County also accessing social networking websites.

Q So the person whose case or investigation sort of sparked your interest literally was at a computer, on a Facebook page when arrested?

A According to the – I believe it was Pitt County, but it was somewhere out toward Greenville when they notified us that they had served our arrest warrant, [12] "our" being Sergeant Addison's arrest warrant.

They let him know that he was on – on his computer at the time when they made entry into his house. And they said, "Yeah. And by the way, we charged him with 14-202.5, Subsection A, which prohibits sex offenders from accessing certain social networking websites." And that just – honestly, that piqued my curiosity, sir.

Q And from there, what did you do to satisfy your curiosity?

A From there, I went on Family Watchdog, an Internet website, where I was able to obtain a list of what they reported to be registered sex offenders in Durham County.

I then went to the State registry – I believe it was on the Department of Justice website – and accessed those names, to ensure that they were, in fact, registered sex offenders with the State.

From there, I used search functions on the Myspace.com and Facebook.com to see if I could find any matches, sir.

Q When you say you used search functions on Myspace.com and Facebook.com, do you mean that you actually logged into each of those services and used a search feature within the service itself? [13]

A Myspace.com did not require me to log in to set up a profile page in order to – in order to enable a people search.

Facebook.com did. So I did have to log into my personal Facebook account, and then use a people finder or a people search under Facebook.

But Myspace did not require me to log into the site in order to – like I said, in order to search for people, sir.

Q So with Myspace.com, when you were searching, you still were at a Myspace.com address; you just had not created an account to log in?

A Correct. I mean, I went to Myspace.com.

Q It wasn't as if you used Google.com to search.

A No, sir. I went to Myspace.com home page and used – I utilized their people search function.

Q And what did your investigation on Facebook and Myspace reveal to you that was of interest?

A I found approximately seven – well, I found multiple matches from what I – from what appeared to be individuals that I had found on the Family Watchdog list that I then verified through the State website that had both Myspace and/or Facebook pages.

I was able to identify, I believe, eight pages that had been accessed since the law that prohibited [14] registered sex offenders from accessing those websites when it went into effect. I was able to find eight pages that it appeared had been accessed after the law had been put into effect.

Q And when you say eight pages, do you mean eight separate individuals' pages, or eight pages for one individual?

A It was eight separate pages combined, Myspace and Facebook, on seven individuals. One individual had two Facebook pages.

Q And were two of the people that you –

A I'm sorry. Can I correct – can I correct –

Q Sure, absolutely.

A My numbers may be off, but I know one person had two Facebook pages, one person had a Myspace page and a Facebook page at the same time. But so – but I believe I had seven – it was either seven or eight individuals.

But I know that, like I said, one person had two Facebook pages and one person had a Myspace and a Facebook page. Both had been accessed after the law went into effect, sir.

Q And just to clarify, as far as the technology goes, because I think a lot of this is fairly intricate, when you say a person had one page, you mean one account? [15]

A Yes, sir. I'm sorry. I'm – I say page, but a profile – an individual profile account within either Myspace and/or Facebook.

Q So, for example, some of the discovery that I've reviewed in this case indicates, for example, that a defendant may have had five pages on Myspace, but what you're saying as a page, you mean all of that together.

A Yes, sir. I'm saying when I – when I log in and I see the screenshot or the front, when you log into, say, your personal social networking website account, I just counted that as a page.

So I'm just saying the main screenshot that I see, I just counted that as – when I use the term page, I'm meaning the entire account. I'm not saying your likes page, your dislikes page, your – your education page.

I'm just saying your account as a whole. I'm using the term page. So I'm not saying multiple pages. I'm just saying that's the – I'm using page as account.

Q What did you do after you identified these seven individuals as people that you also believed were registered sex offenders in Durham?

A Yes, sir. Once I was able to obtain the unique ID assigned to that account by either Myspace and/or Facebook, I completed a search warrant for Myspace and/or [16] Facebook. I presented them – I've presented those search warrants before a Superior Court judge here at the courthouse.

When those search warrants were signed, I then served them on Myspace and/or Facebook to get the account information, the identifying information for the person that set up the account provide – that was provided to Myspace and/or Facebook and any

associated pictures, links, related comments, anything like that, sir.

Q And after you served the search warrants on Myspace and Facebook to get that information, what happened?

A Within a period of days to a couple of weeks, I started getting information from the two different companies. Both are based out of California.

I was able to get what I believed to be was identifying information, information that was provided to Myspace and/or Facebook by the individuals that set up the account. I was able to get pictures. I was able to get IP address logs, various comments that were made by the individuals or to the individuals on their individual pages or accounts, postings that were made.

Based on all the information I gathered then, I obtained warrants for arrest for those individuals from the Durham County Magistrate's Office for a violation of [17] North Carolina General Statute 14-202.5, Subsection A, sir.

Q And was Christian Johnson one of those individuals?

A Based on an investigation into a Myspace account, yes, sir.

Q And what did you find in your investigation specific to Christian Johnson and the Myspace page?

A The Myspace page was listed under the initials CMJ. When I did a people search for Christian Johnson in the Durham area, I located a match – a probable match under – listed by the name of – under the name CMJ.

When I – when I was able to go to the page, I had seen a picture that was posted on the Department of Justice website. The individual that I saw on the profile – or on the Myspace account CMJ appeared to be the same individual.

There was some listed identify – or listed information – information concerning Mr. Johnson, the fact that he was six-four, a Caucasian male from California. And I believe it listed his zodiac symbol on the Myspace page.

Well, when I looked at the listed date of birth on the Department of Justice website, used the Internet to pull up a list of zodiac signs and what the date of [18] birth ranges were, it appeared that the date of birth for Mr. Johnson fell within the zodiac sign that was listed on that Myspace page.

Based on the pictures looking alike, I drove by the address where Mr. Johnson was registered with the Durham County Sheriff's Department. Out in front of the house was a vehicle with a California license plate. I had the – I was informed that the license plate that was displayed on the car was registered to Mr. Johnson.

Putting that with the information listed on the Myspace page, that he was from, I believe, Whittier, if I'm not mistaken, California, and the pictures that I believed to be were Mr. Johnson, I believe it showed that the last access on the page – Myspace lists the last access – early February 2010, if I'm not mistaken, the third or fourth.

Based on that, that's when I obtained the search warrant for Myspace concerning Mr. Johnson, sir.

Did that answer your question?

Q Yes.

A Yes, sir.

Q After you got that search warrant – is that the search warrant you served on Myspace?

A That's the search warrant I served on Myspace, yes, sir. [19]

Q And what did they return to you regarding Mr. Johnson?

A They – Myspace responded back with a lot of information in a – like a Microsoft Excel package, sir, things like pictures, comments.

Specifically, what exact information did Myspace respond back? I'd have to look – I'd have to look at the sheets that they were – responded back with. They did send copies of pictures and things like that, which appeared to be the exact same photos that I could see on the Myspace page when I accessed it initially, sir.

Q And is that information what you have provided to the District Attorney to be provided as discovery?

A What I did for my – we call it a felony screening. But from my packet, I included everything. I scanned everything onto a disk, and I supplied it to the District Attorney's office. So everything is on there, yes, sir.

Q In your review – excuse me. In your review of all of the web pages on the Myspace website that you believed were attributable to Mr. Johnson's account –

A Yes, sir.

Q – you didn't find any evidence that he had communicated with any minors; did you? [20]

A Not – not that I'm aware of, no, sir. I didn't see anything that appeared to be the communication with a minor. No, sir.

Q Okay. You didn't end up charging him with anything related to communications with minors?

A No, sir. The only thing he was charged with was accessing the website.

Q And as far as your review of the photographs that he had posted on the Myspace website –

A Sir.

Q – whether it was on a photographs page specifically, or his home page specifically, there weren't any photographs of children or pornography or anything that you thought was in any way obscene.

A If — if memory serves, sir, I believe the only photograph of a minor on the page, I believe, according to comments, might have been one of his own children.

And if I'm not mistaken, if I remember, comments were made from other folks, I believe, that pertained to one of his specific children.

And I don't know if he has multiple or just one, but I believe it was a child of his, sir. And nothing inappropriate, no, sir.

Q But it was not inappropriate, that comment?

A No, sir. [21]

Q So other than the access and the maintaining of that website, there wasn't any other charge that you

brought against him based on what you saw on those pages or as part of your investigation?

A No, sir. No – no other charges were brought against Mr. Johnson.

Q And I believe, as part of this, you seized his computer?

A Yes, sir.

Q You didn't find any child pornography or anything, other illegal activity on that computer; did you?

A I do not – I do not believe I have completed a search warrant for his computer. So his computer is still seized, and I cannot say that we have searched his computer as of – as of today. You know, from then until now, I can't say that we've done that, sir.

Q But at least as of today, he doesn't face any charges related to anything –

A Absolutely none coming from me, sir.

Q And I believe you did say that you verified that Mr. Johnson, at least at the time of the offense that you charged, was a registered sex offender?

A Yes, sir.

Q Did you find any evidence that he is ever [22] improperly or not registered as a sex offender?

A No. I worked with the – with Deputy Baker with the Durham County Sheriff's Department, who is in the Sheriff's Department Sex Offender Registry Unit. And he had – if I – if memory serves, he had nothing, no violations or anything of that nature concerning Mr. Johnson and his registry status, sir.

Q Also on the Myspace account that you found that you have attributed to Mr. Johnson, you didn't find anything on there where he had tried to conceal information about himself; did you?

A All I can see was what was put on there, sir. So I – I mean, I can't speculate whether somebody's concealing by not putting information on the account. All I know is what I'm – what I see, which all I'm going to see is what somebody would put on their individual account.

And if we're talking Mr. Johnson, specific, I'm only going to see what he put on the account for me to – or for anyone to see.

Q And that something that anyone could see were his initials; right?

A C – the page was listed under CMJ, yes, sir.

Q Which was accurate; correct?

A Yes, sir. [23]

Q His height, which you've seen him in court?

A He's – he's a tall gentleman, yes, sir.

Q His race?

A Yes, sir.

Q His zodiac sign, which was accurate?

A Yes, sir.

Q Where he was from?

A Yes, sir.

Q Photographs of him?

A Yes, sir.

Q So there didn't appear, at least on the face of it, to be any deception as to who that belonged to.

A Didn't appear so, no, sir.

Q I'd like to change gears here and ask you some questions about your background and training. Have you had any training specifically on the statute that you've referenced, 14-202.5?

A No, sir. Other – other than – other than reading in the book, sir, meaning the general statutes book, sir.

Q Have you read any information that's been put out by the attorney general's office, the North Carolina Attorney General's office, on this statute?

A Not that I recall, no, sir.

Q Do you ever recall looking at something we, as [24] attorneys, call the crimes book or any type of reference manual giving information about this statute?

A Well, the – I'm – if I'm not – I'm not sure if the crimes book that I have sitting on my shelf has it listed, sir, because if I'm not mistaken, it is a fairly newer law once it was put into effect, sir.

Q After you started investigating, did you consult with anyone at the attorney general's office? Did you consult with anybody at the Durham police department's attorneys office or the sheriff's department attorneys office to seek guidance on how to interpret the statute?

A Attorney specific? No, sir.

Q Did you consult anybody on how to interpret the statute?

A Other than working with Deputy Baker with the sheriff's department, who instruct – and the guidance he provided me was that registered sex offenders are provided with periodic mailings that either need to be brought back into the office and signed in front of the deputy.

A couple of those mailings specifically acknowledged the fact what this law was about and this law was in place. And, in fact, they were to – to follow this law. Or, you know, this law was out there, [25] so they needed to be aware of it, which prohibited sex offenders from accessing certain websites, sir.

Q Do you know whether that notice to the registered sex offenders gave the specific names of any websites? Did the deputy tell you any about that?

A I don't believe it – I believe it just used the term "social networking" website. I don't think it gave specifics. I'm not sure if it gave specifics, using Facebook, Myspace, Twitter, Tagged, anything like that, sir.

Q As far as your investigation in this case, I understand how your interest developed. Why specifically did you choose Facebook and Myspace to search on?

A Those are the two most common ones that I've heard people referring to, sir.

Q And when you say "heard people referring to," who do you mean?

A People, just everyday life, sir. Not – not police specific. Just the fact that I'm 34 years old and I have adult conversations with other adults in and – you

know, outside of this line of work. So those are the – those are just the two that I'd pick, sir.

Q Were there any other websites that you considered or that you actually did examine?

A No, sir. Just those two, sir. [26]

Q You mentioned the website Twitter when you were listing through some –

A As an example, yes, sir.

Q As an example. Is Twitter a website that you would consider to fall within the statute, based on your review of the statute and common knowledge of Twitter?

A I have – and I have very little knowledge of Twitter. I've never been on the site. From what I understand, it's a status update site where people can just rant about what they're doing and what – and whatnot.

I don't know if you're allowed to post pictures. I don't know if you're allowed to make comments. I don't know if you're allowed to join groups and interact. I've never been on the website, sir. Or I've never been – accessed that group or organization, sir.

Q But at least in your thought process on what might fall within the statute, that was one that you listed, Facebook, Myspace and Twitter. Just sort of intuitively, is that one that you thought of?

A As far as the state definition of what a social networking website would be versus what I – if I used Twitter to associate with Myspace and/or Facebook, and it doesn't fall under the definition, it was unintentional. [27] I just – I just said that when I – what I was

understanding, sir. So like I said, if I'm misleading, it's unintentional.

Q And I'm not saying you're misleading.

A Yes, sir; yes, sir.

Q I'm just trying to –

A Oh, no, I'm just –

Q – understand the parameters of the law. As far as your investigation of this case, have you investigated – other than these seven individuals, did you conduct investigations of anybody else related to this statute?

A I'd found numerous matches of individuals that had Myspace and/or Facebook accounts that I did not pursue because the last shown accessing of that account, according to Myspace or Facebook when they put the dates out there, were prior to the – the law being enacted.

So I did not further investigate those because it appeared that once the law was enacted, they were following what – what the law was intended for, it appeared, sir.

Q And that leads me to my next question. As far as the statute is concerned itself, Mr. Johnson is charged by – I believe you were the officer that drafted the charges? [28]

A Yes, sir. Yes, sir.

Q He's charged with maintaining the Myspace account.

A Yes, sir.

Q Is it your understanding of that word, maintain, that it would require some affirmative act by a person to keep the website or the account active?

A My – when I charged Mr. Johnson, it appeared to me that when I saw the last action on the account, when the account was last accessed, being after that date, it doesn't tell me – I wasn't able to determine what that accessing was for.

I don't know whether it was to access it to post a comment, to look at a comment, to read a comment, to look at a picture, post a picture. All I know is that it was accessed February of 2010.

So based on that, maintaining to me was accessing that account. For what reason? Honestly, at the time, for what reason didn't matter to me. You weren't – read it the way I read it, a registered sex offender was not allowed to access those – those website – specific social networking websites.

Q I guess the reason I'm asking about the word maintaining is because you said there were people that had accounts you thought probably were created before [29] they registered, and then you could not determine that they had accessed it after the date of the statute's enactment; right?

A Correct.

Q I guess my question about maintaining is, if the registered sex offender allowed that website to continue in existence without actually removing it, weren't they in essence maintaining it?

And I guess – I guess the reason I'm asking is because it seems like the word maintain is different

than access. And maintaining means allowing to continue in operation.

But you're saying your understanding of maintaining would require some affirmative action as opposed to simply letting it exist.

A Well, in order to delete the website, I guess the person would have to access the website, which according to the North Carolina general – the way I read it, the North Carolina general – or the way I read it, the North Carolina general statute, that individual is not allowed to do.

Q And so if a person had an account before they registered as a sex offender, which they –

A Which at the time was not – or even –

Q – or even if they were registered – [30]

A – or even if they were registered prior –

A I'm sorry.

A Oh, I'm sorry.

THE COURT: The court reporter can only take one at a time, and I don't know who she's going to choose.

WITNESS: Yes, sir.

THE COURT: So as a result, make sure that you're not talking over one another.

WITNESS: Yes, Your Honor.

THE COURT: Thank you. So question, then answer.

DIRECT EXAMINATION RESUMED BY MR. GERDING:

Q I think we were in agreement, it could be either a registered sex offender who had an account before the law changed or someone that was not a registered sex offender and had an account.

And then what we were discussing was that if a person had such an account, the law changes, they're a registered sex offender, the only way for them to delete the account would be to access it is what you, I think, were saying.

A Yes, sir.

Q So if a person believed that he had to delete [31] that account in order to not be maintaining it because it was still in existence, then what you're saying is, the only way for him to not maintain it would be to access it to delete it.

A No. To not maintain it would be to not access it, which is why I didn't pursue any of the individuals that had not accessed their site after the law was enacted and it became – and it said after December 1st of this date, you are not allowed to access this account. You know, you're not allowed to access social networking websites.

Q So then your understanding of the statute would be if a registered sex offender has an account on Myspace or Facebook, let's say it's an account that he had set up before he ever registered. As long as he never logs into that account, the registered sex offender can keep that account on Myspace or Facebook.

A No, I didn't say – no. I just said I chose not to investigate those accounts. I was looking for the individuals that were accessing their accounts after the law became in – the law became the law, after it was

enacted. Those were the accounts that I chose to further investigate.

Q Then are you saying that that was just a matter of discretion on your part as to which to investigate? [32]

A Yes, sir.

Q Do you believe that you could have investigated and charged the ones who had the accounts prior to registering if they had not logged in?

A I believe that, had I charged them, I don't – I don't think it would have been right. Because if an individual has, I think that – honestly, I think the law is tricky on how those individuals can get rid of that account.

And I don't – I don't know that the law takes into account how to get rid of that account.

So in order for these individuals to try to get rid of it, they'd have to access it. And I don't think it's – I don't think it's fair for somebody to – for me to tell you, "Go on this website to get rid of your account. Oh, now that you went on that website, I'm going to charge you at the same time." I think it's a delicate situation, sir.

Q But you would agree, then, it is a delicate situation, as you put it, whereas a registered sex offender very well might have a Myspace or Facebook account created legally and lawfully before they became registered. They never access it after they register. And yet, that account could still exist.

In other words, a registered sex offender could [33] still have an account on those websites, so long as he doesn't access it.

A Well, I will tell you that there are several accounts within Myspace and/or Facebook for – that didn't – that appeared not to have been accessed prior to when the law was enacted, that I believe are – that were created by registered sex offenders in Durham County. There are right now.

But I did not investigate those pages because they don't appear to have been accessed after the law became enacted, sir.

Q I want to back up one second to your investigation of Mr. Johnson –

A Yes, sir.

Q – and the Myspace pages that you have attributed to him.

A Yes, sir. Or the –

Q At any point –

A The Myspace account?

Q Yes.

A With multiple pages within that account?

Q Yes.

A Yes, sir.

Q Myspace account with the multiple pages.

At any point, did you discuss with any [34] representative of Myspace the deletion or the closing of that account?

A Yes, sir. Specific that – that account? Or in general, both Myspace and Facebook?

Q I haven't heard you testify to be on Facebook.

A No, no, no, no. I'm just saying those two companies in general. Myspace has a policy that if they are aware that a registered sex offender in any state in the United States has an account, their policy is to delete it.

I did put in a preservation order for Mr. Johnson's account. They advised me that while they understood that the preservation order was signed, they were still going to delete the account, just based on the fact that he will – Mr. Johnson was a registered sex offender, and they had a policy not to allow registered sex offenders to have accounts on their site, sir.

Q And the preservation order that you submitted to the – to Myspace regarding Mr. Johnson, did that require that they preserve it on the Internet, or that they preserve the data so that it could be accessed at a later time?

A I believe they were going to preserve the data that could – so it could be obtained at a later point in time. But I believe they were going to delete the [35] information off of the Myspace site so that you could not go out to Myspace and access Mr. Johnson's account.

Q Your use of the word access leads me to my next questions. What is your understanding of what it would mean to access a website that is defined as a commercial social networking website?

A As in access, going on – you know, accessing the Internet, going onto Myspace and using a search function, logging in to your personal page to access other people's pages?

You know, I know with Facebook, you need to log in to your personal account. You can play, you know,

interactive games. You can join groups. You can "like" public figures. You can – you know, you can send messages back and forth. You can post comments about what you're doing. You can comment about other people's statuses, things of that nature, sir.

Q Is it your understanding of the term access, that it would require some type of logging in to an account?

A In order for Facebook, yes. Myspace, in order to do a people search, I did not have to. So I did not have to log in to – I didn't have to create a Myspace account or a Myspace page in order to access Mr. Johnson's or the information that was posted. [36]

All I had to do is access Myspace, the home page, use a people function, look under the – you know, when I found the page CMJ, click on the link to it, and it brought me to the main account page for Mr. Johnson, and I could see what information was posted there.

But I did not need to log in to Myspace. I could do that from – just from the Myspace home page.

Q And so your understanding of the definition of access would be simply typing into the Internet browser address bar the web address, www.myspace.com. That would be sufficient to constitute access.

A No. That's what I did, sir. That's what I did to access Mr. Johnson's page. If you're asking me what I consider to be access on Mr. Johnson's part, I don't know. That's not what I'm saying.

All I'm saying is for me to access Mr. Johnson's page, all I had to do was, in the Internet search bar, www.myspace.com. Myspace home page pulled up.

There's a search – a people search engine on it for individuals that had Myspace accounts, and that's what I used.

Q And so is it your understanding then of the term access, that had you been a registered sex offender – I know you're not – but had you been a registered sex offender and done those steps you just described, that [37] you would have violated the statute by accessing Myspace?

A I would need to clarify, because right now I'm – I'm not able to say with 100 percent accuracy, if the law uses an "and" or an "or" in there when it pertains to access and/or maintain. So I – you know, I'd have to – I'd have to clarify, sir.

MR. GERDING: May I approach the witness, Your Honor?

THE COURT: Yes.

Q Corporal, I'm handing you a copy of North Carolina General Statute, Section 14-202.5.

A Yes, sir.

Q I'll just hand that to you for your reference during my questions.

MR. GERDING: If the Court would permit the witness to continue to have that.

THE COURT: That's fine.

A Yes, sir.

Q And, Corporal, I would invite your attention to Subsection A, which creates an offense for a registered sex offender who accesses a commercial social networking website.

A Yes, sir.

Q And then the other parts about maintaining or creating are separated by the word "or." So in terms of [38] an offense, would you agree with me that accessing under the statute would be an offense?

A Yes, sir.

Q In addition to maintaining?

A Yes, sir.

Q So then going back to the steps you took when you were researching on Myspace, Mr. Johnson, do you believe that the steps you took constitute access under Section 202.5?

A I know it's a yes or no question, but it's a –

Q And I'm not – I'm not asking you –

A Yes, I'm not –

Q I'm not saying there is a right or wrong answer. I'm just asking for what your opinion is.

A I don't know, sir. And I guess I would say yes for as far as Myspace goes, yes, sir. Getting onto Myspace.com and using a search engine would be accessing Myspace, sir.

MR. GERDING: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

Q Corporal, I'm going to hand you a copy of page 138 of Defense Exhibit 1, and I'd ask you just to take a look at the – this page I've handed you.

A Yes, sir. [39]

Q Does it appear familiar to you?

A Yes, sir.

Q And what do you recognize Defense Exhibit 1, page 138, to be?

A It appears to be the home log-in page for Facebook.com, sir, or a screenshot of that, sir.

Q And is the address in the address bar www.facebook.com?

A Yes, sir.

Q And from your review of that, does that appear like what you have seen on Facebook yourself?

A Yes, sir.

Q I'd also like to hand you to look at Defense Exhibit 1, pages 145 and 146.

A Yes, sir.

Q What do those two pages appear to be?

A The first page, which would be 145, appears to be a[n] Internet search of Governor Bev Purdue with a Facebook account.

When this shot was taken, it appears that the individual was not logged in to Facebook in order to access this because it – there's a sign-up button right up in the middle.

And down in the lower right-hand corner of the page, there isn't a chats box, which I know from using [40] Facebook, you would get that box up in the – on the – in the lower right-hand corner.

Page 146 is a screenshot of the same Bev Purdue page on Facebook after somebody's account has been logged into. So using their Facebook account, this was page 140 – it appears, 146 is from, sir.

Q I would ask you, then, to also look at Defense Exhibit 1, pages 147 and 148 –

A Sir.

Q – which, just to speed things up, I'll ask you, does it appear to be a web page for the Mormon Church?

A For –

Q What –

A For LDS Church –

Q – LDS, Latter Day Saints, one page being not logged in to Facebook and the other page being logged in to Facebook, similar to the Bev Purdue websites?

A Yes, sir.

Q And then I'll also hand you Defense Exhibit 1, pages 149 and 150 and 150-1.

A Sir.

Q And, again, to speed this up, these are similar to the Bev Purdue, the LDS websites. Would it be fair to say this is a US Government Facebook page, with one being [41] logged in – well, the first being not logged in, the second being logged in, and then 150-1 not logged in?

A Similar to the others in those aspects, yes, sir.

Q All right.

A They're all in order. Thank you, sir.

Q Corporal, regarding the Facebook pages where a person – where these screenshots give information, for example, on Beverly Purdue, information on the Mormon Church, and information on the United States

government, for the Facebook pages where the person who took these screenshots is not logged in, would you consider that under the statute to be access – accessing Facebook?

A I don't know if – I guess I don't know if accessing a link on a search engine – example, Google or the Yahoo search engine – for Governor Purdue and accessing a link would constitute accessing – example Facebook.com. – by accessing that link to find out about Governor Purdue, as opposed to me going to Facebook.com and logging in and accessing the website to get to Governor Purdue's.

There are – you know, there are functions that I can do when I log in to Facebook on that Governor Purdue page that I can't do when I access – when I access a link on example Google. [42]

Yeah. I can't post comments on the page. I can't like the page. I can't send a message to the operator of said page.

Q But would it be fair to say that your understanding of Facebook, from your own use, from your investigation and from review of these web pages is that a person can find information on Facebook.com, using that address, Facebook.com, without having to log in to an account?

A I don't know that – I've never tried to access a page going to Facebook.com without logging in as opposed to going to a general Internet search, using a search engine similar to Google and typing it in.

Now, could a page, a public figure page, or a page that is maintained on Facebook, could it become

visible using that search engine similar to Google? Yes, sir.

But I don't know about going to Facebook, and without logging in to Facebook, could I access those pages, meaning I don't know that I could – I don't know if I could go to an Internet search bar, you know, pull up a computer and type in, example www.facebook.com\bevpurdue1003 – whatever the search bar or whatever the page is, sir.

MR. GERDING: If I may approach the [43]witness again, Judge?

THE COURT: Yes.

Q Corporal, I'm handing you again the screenshots from Bev Purdue, LDS and US government, and ask that you take a look at the address in the address bar between the logged in and the not logged in pages.

A Yes, sir.

Q They're identical; aren't they?

A Yes, sir.

Q So it appears, at least from these screenshots, that the web address could be typed into the address bar, and information on Bev Purdue, LDS and US government be reached on the Facebook website without having to log in?

A Appears? Yes, sir. I – I can't say that you can, I can't say that you can't. I've never tried that. And that's all I was trying to say earlier, I've never done that.

But – but the Internet or the web addresses on example Governor Purdue's page, appear to be the same, as well as the Mormon Church Facebook page or

the LDS Facebook page, as well as the US government page. The Internet address as listed on both pages are the same, sir.

Q And so in terms of your discussion about accessing these Facebook pages without logging in, you [44] were saying, well, if you found it through Google, for example, you did not know whether that would classify – or that would fall under the definition of access.

A I guess, are you asking – are you asking me access or are you asking me intent?

Q I'm just asking about the term access because the statute prohibits access.

A Right.

Q So what I'm essentially asking you, if Christian Johnson here was sitting at a computer, and you were looking over his shoulder, if he typed in www.facebook.com, and the web page came up for Facebook.com, do you believe that under the statute he has accessed Facebook?

A The main page or any subsequent page maintained within Facebook?

Q Facebook. We've been talking about Facebook.

A Right. Yes, sir. I – given the scenario you've given and – and after reviewing the documents provided by you, yes, sir.

Q So you believe that would be access under the statute?

A Yes, sir.

Q So then your understanding of the definition of access would not require a log-in in order to violate the [45] statute?

A No, sir.

Q Along those lines, you mentioned subpages or other pages within a website.

A Yes, sir.

Q Could you explain what you mean by that?

A As far as an individual account, sir?

Q As far as just an Internet website in general. You discussed the main page, and then I think you used the term subpages. What did you mean by main page and subpages?

A Using a person's account or one of the accounts that you just provided, sir? Meaning the screenshots you just provided me?

Q Using an account, let's say.

A Okay. When I – when I used the term subpages, I meant an individual when they create – it appears an individual when they create an account with Myspace, there is an option for them to include photographs. there's an option for them to included types of music, interests, likes, dislikes. They can have friends. They can chat with friends. Friends can post on their pages.

When that information got back to me from Myspace, they – Myspace called them folders. So there were different folders pertaining to chats or – [46]

So that's the subpages I was talking about was chats, likes, dislikes, friends, education, hobbies, all

things that you can elaborate on within our personal account for Myspace and/or Facebook.

Q And so backing up to the term access again, for your understanding and testimony just now about typing in Facebook.com or looking at any of the subpages, let's say that you're not logged in, but subpages of Facebook, your understanding of the statute and the term access would prohibit a registered sex offender even from looking at these screenshots I gave you where a person is not logged in?

A Yes, sir.

Q So then, let's take this concept of subpages and main page to a website called Google.com. Are you familiar with Google.com?

A Yes, sir.

Q As a search engine?

A Yes, sir.

Q But also as having multiple features that a person could use?

A Yes, sir.

Q Features such as email?

A I've never used Google, but if you say that you can access Google to get email, sir, I've – I've no [47] reason not to believe you.

Q Have you heard of [G]mail?

A Yes, sir.

Q And that's a[n] email function of Google.

A Okay. Didn't know that but do now, sir.

Q Let's say also that Google had a chat feature or a message board feature or a social networking feature.

Would your understanding then of the term access as you have understood with Facebook, would that prohibit a registered sex offender from going to Google.com main page?

A I don't know that Google.com would fit the definition as provided by the State of what a social networking website is.

Q Are you familiar with –

A Which would be – well, I'm sorry – which would be subsection B, still using the same sheet of paper that you provided with me earlier, sir, of what a[n] Internet or commercial social networking website and meets the following requirements.

Q Are you familiar with a feature of Google called ORKUT? That's O-R-K-U-T?

A No, I'm not, sir.

Q Would your understanding, then, of the term [48] access be that if Google.com had subpage that was comparable to Facebook, let's say Google has a function within it that is the functional equivalent of Facebook, but it's something that Google has created. And that that would be accessed, for example, at Google.com\facebook equivalent, whatever that address would be.

I think we could agree that accessing that subpage would violate the statute. Let's say it met the definition within the statute.

A So you're asking me, hypothetically speaking, sir?

Q Yes.

A All right. So you're saying if Google created a similar equivalent to Facebook or Myspace –

Q Yes.

A – and you had to access it through the Google main page? Or you just had to access it's – it's Google.com\make up a website here.

Q Yes.

A Okay. Would accessing make up a website here be in violation? If – if that site fell within what the State of North Carolina has deemed as a commercial networking – social networking website, then yes, sir.

Q So to back that up a step, how would you say, [49] then, that going to just Google.com would not also be the same as accessing that social networking website?

A Well, Google.com and Facebook.com are two different – you don't have to go to a search engine similar to Google to get to Facebook. You go to Facebook, and you go to the log-in page for Facebook, and that's where you intended to go.

But in order to get to the "make up your website" here, you would have to go to Google, and then make up your website here. But to go to Google just as a search engine, Google itself does not fall within the definition of a commercial social networking website, whereas in our hypothetical situation, make up your website here did. Fell into the definition of what the state says a commercial networking website is, sir.

Q So then your understanding would be that, for example, with Facebook, because essentially we all

agree that Facebook is a commercial social networking website, then accessing any web address with Facebook in it would violate the statute?

A Yes, sir.

Q But you're saying with Google, because Google itself may not be a social networking website, only a subset of that web address is, that you couldn't prohibit someone from being on the home page. [50]

A I don't – well, I can't prohibit them if it's – doesn't fall within what the state says is a prohibited place to go, sir.

Q I want to shift gears and ask you a few questions about some other terms in the statute, just for your understanding – from your understanding –

A Sure.

Q In looking at the statute, what is your understanding of the part of Subsection A that says that the sex offender has to know that the site permits minor children to become members or create or maintain a web page?

And, specifically, I'm asking you about the site permitting the minor children to do those things. What is your understanding of the site permitting that?

A What is my understanding that – that that face – that a site allows minors? I don't – can you rephrase it?

Q Sure. I guess what I'm asking you – I guess I should just ask you some examples.

A Okay, yes, sir.

Q For example, let's say the terms of use – and are you familiar with what terms of use might be for a website?

A Yes, sir.[51]

Q That would be what the website says people can do and not do on their website.

A Correct, sir.

Q So let's say the terms of use say that a person has to be thirteen and older to use the website.

A Yes, sir.

Q Do you agree that that website permits minors to use the website?

A Yes, sir.

Q What if the website terms of use said only someone eighteen and older could use the website? Would that, do you think, fall within what permits a minor to use the website?

A I would say that, while providing a date of birth to the website to verify age is going to be that company's way of stating that they only allow certain folks to access their site, I can't –

Can I say for sure that – that Facebook doesn't know or Myspace doesn't know that access? I can't say that because I'm not the folks that run their company.

MR. McCULLOUGH: Objection, Your Honor. Nonresponsive.

THE COURT: Overruled.

A But would – would there – yeah, terms of use. [52] By stating you must be eighteen years or older in

order to access this, would that mean that they are permitting minors to use the site? No, sir.

But, you know, like I said, anybody can say what they want when filling out their – their information to that.

But am I going to say that Facebook or Myspace or any social networking website allows minors to use it when, in their terms of use, it says eighteen or older? I can't say what they know or don't know.

Q And I guess those are my questions. For example, a website, Match.com – have you ever heard of that website?

A I've heard of it. I've never accessed it, but I've heard of it, so I don't know what – if you tell me what it's about, I'm –

Q It's a dating –

A – I'll agree with you.

Q It's a dating website that involves connecting people for whatever reasons.

A Yes, sir.

Q And let's say Match.com has a terms of use posted on the website that a person has to be eighteen or older to use the website. But their method of verifying the person's birth date is what the person puts in when [53] they register. It's sort of self regulation.

As you mentioned, you said something about people putting in birthdays. If that website actually has minors that are using it, because they put in false birth dates, is that website permitting minors to use it?

A I guess I don't know what types of checks and balances that website's going to have to – you know, to find out minors that are using their website or if they're – if they do know, if they allow it to use. I don't know.

You know, obviously, I don't work for that website or I don't work for any website. So I don't know what type of checks and balances they would have within their own company, sir.

I can't – obviously, you and I can't tell folks how to run their stuff. So shy of identifying through the visual inspection of state-issued ID cards or birth certificates, I don't know. And, obviously, that's not feasible.

Q I guess, just in terms of your role as an investigator, if you were investigating somebody for communicating with a minor on Match.com and trying to decide if this statute applied to Match.com, and you were looking at whether that website was permitting minors to use it, despite their terms of use, how would you proceed [54] in trying to determine whether they permitted minors to use it or not?

A How would I proceed if I – if I'm looking to see if they're allowing minors to use their site?

Oh, it's not – I guess it's not a violation of any criminal law that I'm aware of that they – you know, whether they allow minors to use their site or not.

I guess I know from – I've never used Match.com, but had I known and had I used Match.com, I might be familiar with, you know, different individuals using it.

Personal experience using Facebook.com, I know individuals, you know, under the age of thirteen that have a Facebook page. What information was

provided to Facebook, I don't know, but I know that there are minors on Facebook.

But on Match.com, I don't – I don't know how – I mean, other than trying to find identifying information about the individual and speaking with that – a specific individual, as far as age goes. Other than that, I don't know how to verify, sir.

Q Okay. Then let me – let me ask you this. Maybe with some concrete facts. Let's say Christian Johnson wanted to use Match.com to meet friends. And he saw that the user – terms of use said that a person had [55] to be eighteen or older.

So he sees that minors are not supposed to use the website. He logs in, starts looking at profiles of other users, and he finds someone who is saying, "I'm a 16-year-old. I'm using this Match.com to meet older men," for example.

At that point, do you think that Mr. Johnson or anyone in the situation would have been justified in relying on the terms of use to determine whether that website permitted minors to use it?

Or once he saw that a minor or others were using it, at that point he would need to get off the website and not access it again because he had determined that it was permitting minors, despite the fact there was a user agreement that said not to.

A Excuse me for a second. Let me think about this response for a minute.

If – if we're using Match.com as an example, and just for hypothetical we're saying that it falls within the definition of what the state says is a commercial social networking website, I guess the – I

guess – and you had mentioned it earlier – the term is going to be knows or no – you know, knowingly, it knows that a site allows minors to be -- to be members.

I guess it's when that – you know, it's when [56] the individual knows that a minor is a member of that site that that then becomes a violation, using your – your scenario, that it becomes a violation of the law.

The example you used was Mr. Johnson accessing Match.com at the – you're alleging that at the time he accessed it, he didn't know that minors were members.

Well, once he knows that minors were members, you said, I guess my reading of it, that's when it becomes a violation, when they know that minors are accessing the website and they have – they have pages or accounts on that site, sir.

Well, it – that's how I would – that's how I would interpret the scenario you laid out for me, sir.

Q All right. Thank you.

A. Yes, sir.

Q Moving on to another part of the statute, Subsection (b)(1). In terms of your investigation of Facebook and Myspace to determine whether they fit within the statutory definition of commercial social networking website, what steps did you take to determine whether Subsection (b)(1) was satisfied for purposes of Facebook and Myspace?

A When I went, memory serves me, looking through the different information provided by Myspace and Facebook about what – you know, the general, what they [57] do, where they're at, I know Facebook had a clause in there that they advertised – they posted advertisements.

You were subject to getting different pop-ups on the – on the side of your page, based on, you know, information you put out there so that they could best, you know, cater advertisers to you in the things that you would be interested in.

Q Would it be fair to say that what –

A Sir.

Q – you did was look to see, number one, if they had advertisements posted on the website and, number two, also looked at any terms of use or membership agreements and things that discussed whether advertising was a possibility?

A I did, sir. Yes, sir.

Q And those are what satisfied you in your mind that Facebook and Myspace derived revenue from advertising?

A Yes, sir.

Q It wasn't something where you called the companies and said, "Hey, do you guys advertise? Send me your budget or your balance sheet to show that you use these websites to make money," did you?

A No, sir. The only interaction I had with either Myspace and/or Facebook was with their law [58] enforcement assistance teams when I was serving – or the subpoena compliance teams when I was serving the appropriate processes on them, sir.

Q So then, in looking at other websites to determine if they were commercial social networking websites under this definition, would it be fair to say, as an investigator, that's what you would look for,

circumstantial evidence such as posted advertisements or something in the terms of use?

A That – those could be areas that I could look at, yes, sir.

Q Okay. I wanted to ask you then about Subsection (b)(2).

A Yes, sir.

Q In terms of trying to determine if a website meets the definition of a commercial social networking website, what would you believe would be characteristics of that website to show that it facilitated a social introduction between people?

A What would I be looking for?

Q Yes.

A Specific to those – to Myspace and/or Facebook, because those are the two that I looked at?

Q Any website that you would consider investigating as to whether somebody had accessed it or [59] maintained on it to see if it fits within this definition.

A I guess examples that I looked for when – when reviewing the accounts on Myspace and/or Facebook, pages that could be liked, groups that could be joined of – of persons of the same interest, whether that was employment, education, extracurricular, music groups, the ability to, you know, talk or converse electronically, email back and forth with different individuals on – in those groups or units.

Those were – those were some of the major things that I looked for, like I said, when looking through those two websites, specific, sir, Myspace and Facebook.

Q And in your response, you mentioned some specific aspects of websites that people could use, the groups, email, messaging, those type of things.

A Yes, sir.

Q What I didn't hear from you was that you would look towards what the subject matter was. So, for example, you said groups that – or pages that could be about employment or hobbies or things like that.

A Well, like interests, yes, sir.

Q Like interests. But you weren't specifically looking to see whether it was things about social [60] discussions, so discussing parties or discussing going to events or things like that.

It could have been employment or finances or sports teams. Is that fair to say?

A I know from personal experience using Facebook, as an example, that attending functions or talking about an upcoming function might not be viewable to the outside public unless you are specifically invited to that function, meaning there is a get-together tomorrow night at 123 East Main Street. And if I wasn't invited by a member of that party or group, I might not see that event.

But as far as Facebook goes, I do know that they – I can "like" 123 East Main Street, as an example, and I might see other individuals that "like" 123 East Main Street. And we can comment about why we like 123 East Main Street. We like it because of the food, whatever. You know, whatever we like about 123 East Main Street.

We can post pictures about 123 East Main Street or previous experiences there. We can post

pictures about anything, and just tag it as 123 East Main Street, as an example.

Q I guess the reason I'm asking the question, and this might help clarify your response – [61]

A Yes, sir.

Q – at the last hearing, the State seemed to argue that a number of the websites that I had proffered to the Court did not facilitate the social introduction between people because they involved things like discussions about medical procedures or things like medicine or health.

The website, MedHealth.org, for example, is one that I proffered. And I think the State's contention was that that wasn't social introduction, mainly because of the topic.

What I'm hearing from you is it's more about the functions of the website as opposed to topic. Is that fair to say?

A Yes, sir. Based on one – you know, obviously, our question-and-answer session so far; yes, sir.

Q Regarding Subsection (b)(3) –

A Yes, sir.

Q – as far as defining what a commercial social networking website is, is it your understanding of that subsection that all of those functions would have to be present or simply some of those?

And what I'm referring to is it says, "Allows users to create web pages, personal profiles that contain information, such as the name or nickname of the user, [62] photographs, other personal information, links to personal web pages."

And so I guess what I'm asking, is it your understanding of that subsection that the website has to permit all of those – name, nickname – name or nickname, photographs, personal information and links to web pages? Or is it your reading of the statute that when it says "such as," that's a list of things that could be considered information?

A I guess I don't see the word – the only time I see the word "and" in Subsection 3, under A, Offense, is, "Links to other personal web pages on the commercial social networking website of friends or associates of user that may be accessed."

Otherwise, I don't see the word "and" where it says – where it specifically says that it must have this and this and this. I don't interpret the comma as an "and," sir.

So I would say that, because I don't see the word "and," I'm not going to interpret the comma as an "and," that it must have all those in order to satisfy the definition, sir.

Q So mainly what you would look at would be whether the personal profile contained information about the person. And then this gives you some examples of [63] what it could be?

A It contains information such as name, pictures, other personal information, links to other pages.

Q And I would ask you then to look at Subsection (b)(4) to compare that, and ask if you believe that also to be similar, where the website doesn't have to have a message board, a chat room, electronic mail and instant messenger, but it does have to have mechanisms to communicate, and those are some examples.

A And those were – those appear to be, how I read it, examples, such as, and those are the examples provided, sir.

Q I have a few more very specific questions. Do you have any opinion on whether this statute would apply to accessing Facebook or Myspace through a cell phone?

A In my opinion, the medium in which you access the website doesn't matter. The accessing of the site is what's the violation. So whether you access it through a cell phone, whether you access it through a computer, you're accessing the site.

To me, it's still a violation, whether you access it through the cell phone, an app or an application on your cell phone versus accessing it through a computer, sir.

Q Do you think it would be accessing under the [64] statute if the cell phone somehow can take your contact information from Facebook or Myspace provided to you on the phone so that you could call people or look at their address?

A I don't know. Like, an example, like a – like a Android or a Blackberry –

Q Yes.

A – syncing up with –

I guess I don't know how the technology links your phone with a profile page without you applying some information about yourself on your profile page.

Example, I know on my Blackberry phone, I can get pictures from Facebook of friends because I have included my cell phone number on my personal page.

But as far as it linking up without providing information to that website, I don't know how the technology works in order for it to do that, sir.

Q And I guess the best hypothetical to ask about would be going back to the person who had a my -- had a Facebook page before they were convicted as a sex offender, they were convicted as a registered sex offender, they don't ever go back on the computer to do anything on that Facebook page, but they still have their cell phone which draws data from that for the pictures or the phone numbers. [65]

Would it be your opinion, then, that that would be accessing that Facebook page for purposes of this statute?

A But are you – I guess, to elaborate on your hypothetical question – your hypothetical situation, but are you accessing the site, or are you accessing a contact on your phone in order to call, and your phone brings up a picture but it doesn't bring up the Internet site?

You know, it doesn't bring up that person's page; it just – you just find the person you're looking for, you hit send, and a picture is on your phone.

I don't know if that's accessing the site or if that's accessing a contact on your phone, you know, through the memory card on your phone.

Q Well, let's say it does actually connect through the Internet to Facebook to draw that name, so that if a friend that you had on Facebook before you were a registered sex offender changes their picture on Facebook, now you're a registered sex offender, you're using your phone, and it draws that new picture from

Facebook.com, then is that considered access of that website through your phone to use those functions?

A I guess my most honest answer is I don't believe I have a – enough of a legal background to make [66] a determination of whether that's accessing it or not, sir.

All I can offer you is that I – I don't even know that I could offer you a good opinion as to the answer to that question, sir.

Q So to put it in perspective as far as you being an investigator, I know you're not with that unit anymore, but –

A Yes, sir.

Q – let's say you still were, and you arrested Mr. Johnson for some unrelated offense, you had his cell phone, and you were doing a search of it properly with a search warrant. Let's say you suspected him of being involved in some other activity.

A Yes, sir.

Q And you saw that his phone had been getting data from Facebook for these pictures of his contacts. Would you at that point consider that as something to investigate as far as him accessing Facebook?

A I guess I would have to contact the social networking website to see if, through their means, you know, their technology, if they were able to determine what type of access, if there was access to the site, or whether it was an information pull, as you were talking about earlier as far as just pictures. [67]

And I don't know if you can clarify one versus the other, you know, whether it's an intentional going

to via the application button on your phone versus the data pull of a picture.

I don't know if you – if you can determine which one is which. I don't know if you can differentiate between the two.

I know that I don't have near enough the computer sense and – to go about that. I would have to ask folks that know a lot more about computers than I do to see if that can be determined, sir.

Q As far as your decisions in charging, in this case or any of the other cases, or just any case under the statute in general, how did you make your charging decision as far as the number of charges to bring against any of the individuals?

A I only – each individual is only charged with one count of violation of this general statute. I didn't choose to go back and look at every time an IP address was used and each time the individual's account was accessed to – for lack of a better term – stack charges, and end quote.

I felt that the one charge per person for accessing and/or main – and/or maintaining that personal account page or personal account within that company or [68] my – you know, Myspace and/or Facebook, in my opinion, was sufficient to basically end my investigation, sir.

I felt that it – I felt that was reasonable.

Q And I appreciate that.

A Yes, sir.

Q However, as far as what you could have charged, did you feel that it was within your abilities as

a law enforcement officer to charge each and every time that a person may have logged in to the account?

A Based on the – based on the wording in the definition, because it says "access," and then later on it says "or maintain," I believe it – it could have been permissible to charge for each time the individual account was accessed. Yes, sir.

Q As far as maintaining goes, do you think that you could charge an individual for each page that is maintained?

So, for example, I think with Mr. Johnson's case, you have a home page, a page with some photographs, a page with might have been blogs or videos, maybe four or five is what you provided in discovery.

A I don't think that – I don't believe they were – I think you had to have the main account page before you could have any of those subfolders or those subpages.

I don't think you can have just a subpage without the [69] main page for an individual person's account.

So I think, to maintain the main page, you maintain all the subsequent subfolders. I believe it's all – it's all connected to the one main page, sir.

Q So in your opinion, it would be maintaining a presence or maintaining, I think it says personal web pages, would be a single offense as opposed, for example, a hundred different offenses if they had a hundred different page – subpages of their home page.

A I don't – well, I wouldn't – me, personally, I wouldn't have charged Mr. Johnson for having a folder with pictures in it, and then having a folder with his

education background in it, and then having a folder with personal messages where he'd been going back and forth.

All of – all of that together to me was maintaining a – the profile page, CMJ, on Myspace.com.

Q And had he had a separate account, let's say, that was Christian Johnson, not CMJ, do you feel that would have justified two separate charges?

A So there was CMJ and then there was also Christian Johnson?

Q Yes. Same person, same information, just maybe different –

A Two different –

Q – identifiers. [70]

A Two different member ID numbers?

Q Yes.

A Which would have been up at the top in the – in the Internet access bar?

Q Yes.

A Yes, sir. I do believe that would have been two separate charges had it been in Mr. Johnson's case.

And as far as my overall investigation, that was the case, because I did have somebody that had two different Facebook pages, and I charged – I charged – I did charge him twice, once with page number 1 and then page number 2.

Q Because those were separate –

A Because they were separate, had separate IDs, they were accessed different times, they were started at different times.

Q And I think I have one or two more questions.

A Yes, sir.

Q As far as the statute goes and as far as charging a registered sex offender under the statute, do you believe a registered sex offender could be charged under this statute if he has another person posting information on a web page that he had created prior to being a registered sex offender?

A I don't know that I have the – again, I'm [71] going to have to say I don't know that I can argue the legality of if I – example, because we've been using examples a lot — I'll be the registered sex offender. If I ask you, "Hey, will you put this information on my page?" I don't know what – I don't know if that equals maintaining or not, because I'm asking you to do something on a page that I know I can't have.

Personally, I would have to – I would have to seek guidance from, say, the District Attorney's office on whether they feel that that was appropriate.

I'd have to ask folks with a little bit more legal background than – than I possess at this point in time to accurately answer that question, given those specific set of facts in our hypothetical situation, sir.

Q And the last question area that I have, and this is going back to the questions related to home pages and subpages of a website.

A Yes, sir.

Q In Subsection B of the statute, it talks about a commercial social networking website is an Internet website. And it uses that phrase, Internet website.

Is your understanding of Internet website that it is a[n] address that's typed into the address bar and any subpages, or is it just the subpages themselves?

A Can you ask it one more time? You can ask it [72] the exact same way. I under – I think I understand it. I just want to hear it again.

Q My question is, regarding Internet website in Subsection B, does that refer to the address that's typed into the web address bar on the browser and any subpages, or does it apply only to the subpages?

A So the fact that I go to open up a – open up the Internet on my computer using the icon on the desktop, the fact that I type in www.myspace.com or Facebook.com, typing that in?

Or are you asking me if I – once I get into Facebook or Myspace and using all the subsequent pages, or the Governor Purdue's website like you showed earlier?

I guess I would – I would, I guess, contend that the fact that I opened up the Internet browser and typed in a – the address into the Internet address bar that I have accessed the Internet, and now I am accessing an Internet website once I've accessed – once I'm utilizing that address bar on – on the Internet browser, sir.

Did – did that answer your question?

Q It did.

A Okay.

Q That's exactly what I was asking.

And then, I think I've already said it was my [73] last question, but I do have another last question.

When the statute uses the term "minor," what age do you believe that term "minor" means, and why?

A Well, obviously, I know, as a Durham police officer, as far as an individual that has committed an offense, I know the State says sixteen or older you can be charged as an adult.

I also know that, as a Durham Police Department officer, if you are under the age of eighteen and an offense was committed on you, we considered you a minor; meaning if you were seventeen and somebody assaulted you, my unit would look at it.

So that's where my basis came – you know, that's where my basis come from as minors. So I said, my belief is under the age of eighteen.

Q But you're not aware of any definition that you've relied on from anything specific –

A Not as far as this investigation goes, I did not specifically look up the term "minor" and determine what the State – if the State has set out a definition. I did not do that, no, sir.

MR. GERDING: At this point, Judge, I don't think I have any other questions. Thank you.

THE COURT: We'll take a break. It is 12:09. We'll take a break until 12:25, Mr. Bailiff.

* * *

[74:3]

THE COURT: Questions from counsel for Defendant Johnson have completed questioning. Now at this time, counsel for Defendant Packingham, Ms. Norton-Ramirez, may ask her questions.

MS. NORTON-RAMIREZ: Thank you, Your Honor.

CROSS-EXAMINATION OF OFFICER SCHNEE CONDUCTED BY MS. NORTON-RAMIREZ:

Q Good morning, corporal.

A Yes, ma'am.

Q With regard to Mr. Packingham, could you explain the situation by which Mr. Packingham came to be arrested?

A Yes, ma'am. While searching Facebook.com, I found a Lester Pack – a profile account for a Lester Packingham. Looking at the photograph that is associated – that was associated with that page, it did not appear to be the same individual that I could see on the Department of Justice website as Lester Packingham, the registered sex offender.

There was some, I guess, biographical information associated with the profile page, Lester Packingham, things like high school attended, Hillside [75] High School. I believe the date was 1974. North Carolina Central University, 1978.

I know that both of those educational institutions are here in Durham. I knew that the registered offender was a junior, so it – it was – I assumed that it was possibly related.

On the, I guess, main page, for lack of a better term, the main profile page for Lester Packingham,

there was a recent – there was a list of recent activity to include new associates or new friends on Facebook, one of which was – that I could see was a J. R. Gerard.

I know that the individual that I was looking for was Lester Gerard Packingham, Junior. So using the – looking at the J. R. Gerard profile page, the associated picture for J. R. Gerard appeared to be Les – to me, Lester Packingham, Junior.

One of the comments posted on the profile page for J. R. Gerard was from J. R. Gerard on or about April 27th, so the posting was something similar to – these weren't the exact words, but it was, "God is good. I got so much favor that they dismissed the ticket before court even started. No fine, no court costs, no nothing. And God is great." Something along those lines.

I was able to go to the clerk's office, the Durham County Clerk's Office, and find a citation that [76] was written for or issued to Lester Packingham, Junior, the court date being April 27th.

And I was able to obtain a dismissal order where the citation had been dismissed. I think it was a failure to – failure to notify DMV of change of address, along with another charge, but they had been dismissed.

Based on the posting on the page, in conjunction with the dismissed citation and the picture being similar, or being – it appeared to be the same – the person that I was looking for, I obtained a search warrant signed by a Superior Court judge for Facebook to get the identifying information and any information provided for that individual Facebook account for J. R. Gerard, ma'am.

Q Now, the Lester Packingham page listed J. R. Gerard as a friend, and there was a J. R. Gerard page which was the page that – for the account that we're talking about with regard to the post.

A The account, J. R. Gerard, that I found on Lester Packingham's page, I am contending that Lester Packingham, Junior, was maintaining the Facebook page, J.R. Gerard. Yes, ma'am. I'm sorry.

Q And the Lester Packingham page was Lester Packingham, Senior?

A I – it appears to me that it was for Senior, [77] yes, ma'am.

Q Based upon the college, graduating in 1978 and a picture of an older gentleman as the profile?

A That – that's what I believed at the time, yes, ma'am.

Q And when you came – then you swore out – you got a search warrant for Mr. Packingham's computer?

A No, ma'am. Then I – then I obtained a search warrant for Facebook, which I then sent to California, which is where Facebook's compliance team is located, ma'am.

Q Okay. So your source of evidence is the information given to you by Facebook with regard to the J. R. Gerard account?

A Well, the – my initial source of information was what I uncovered through my Internet search, using Facebook, using my computer, ma'am.

Q Okay. But you don't have Mr. Packingham's computer.

A Yes, ma'am.

Q You –

A The – I – I mean, subsequent – I mean, the investigation continued once – you know, once I sent the search warrant to Facebook.

Once I got that information back, a search [78] warrant – arrest warrant – and a[n] arrest warrant was obtained, and a search warrant was applied for for the residence of Mr. Packingham subsequent to the search pursuant – or pursuant to that search warrant when it was executed, a computer was seized from the residence. Yes, ma'am.

Q And did you go on the computer to see if there was any history with regard to logging in to this Facebook account?

A Not as of now, no, ma'am.

Q Okay. Now, the profile for J. R. Gerard, Mr. – or Mr. Packingham, I think you said earlier that, basically, anybody can say what they want when filling out this –

I could go on Facebook and say that I was you; couldn't I? And open a Facebook page for you. And I don't even have to put your picture, or I could get your picture and put in all this information, and it would – how would it be visible to you that I had done you and you hadn't done it?

I mean, just to the common person looking there.

A So is the question, could you do it? Or could the –

Q Right. [79]

A – question, how would I, as a law enforcement officer, know?

Q No. Could I do it?

A I – yes, ma'am.

Q And so I could set up a Facebook page for a registered sex offender without them ever even knowing it?

A Hypothetically speaking, yes, ma'am.

Q And if I lived in a – and if I shared a computer with somebody, the computer just is going to show an entry to Facebook on the log history, but there would never be any kind of indication that a certain person was actually accessing the Facebook account; correct?

A You and I share a computer –

Q Right.

A Using me as the registered sex offender, you could access using our shared –

(Knocking at the jury room door at this time.)

THE COURT: Hold on.

WITNESS: Yes. Yes, Your Honor.

THE COURT: Since there has been a knock on the door in a jury trial unrelated to this matter, Mr. Witness, if you'll please just remember where you were in about – that statement to be made, I'll need to recess [80] this matter so I can address the jury case.

* * *

[80:7]

THE COURT: We will resume at this time. As we took the recess for lunch, the witness was in the course of rendering testimony on cross-examination.

I'll remind you, sir, that you are still under oath.

WITNESS: Yes, Your Honor.

THE COURT: If you recall the answer that was interrupted that you were giving, you may resume it at this time. If you don't recall it or otherwise counsel needs to re-engage you, I'll turn it back over to counsel. Do you know where you were, sir, in your answer?

WITNESS: If at all possible, I'd like her to ask the question again, Your Honor.

MS. NORTON-RAMIREZ: That's okay. I think I'll just kind of move on since I want to stick to the statute and, specifically, Mr. Packingham's web page.

May I approach, Your Honor?

THE COURT: Yes. [81]

CROSS-EXAMINATION RESUMED BY MS. NORTON-RAMIREZ:

Q Do you recognize this photograph?

A I do, ma'am.

4 Q And what is that?

A This is the photograph that was attached as the displayed picture for the Facebook page, J. R. Gerard.

Q His profile – his profile picture.

A This would have been the profile picture associate with that page, yes, ma'am.

Q And, you know, it's regard – did you note that Mr. Packingham's profile picture refers to Christian Clothing and Accessories?

A I can see where it – it shows on this picture, and it did on the Facebook page, as well. Yes, ma'am, on the picture.

Q And he refers in his Facebook to the business called The Buckle. Do you recall that?

A I don't, not off the top of my head, no, ma'am.

MS. NORTON-RAMIREZ: May I approach, Your Honor?

THE COURT: Yes.

Q I just want to show you some of the –

MS. NORTON-RAMIREZ: This is attached to the motion, Your Honor, my motion. It's the page with the profile picture, that looks like this. This is Mr. [82] Packingham – it's at the end of my motion.

Q This is the profile picture. It says J. R. Gerard, and then kind of a signature. It says Christian Apparel and Accessories, "I can transform ya." www.j.r.Gerard.com.

And then, do you see where he refers to a business called The Buckle?

A I do, yes, ma'am, on or about April 24th, according to the posting.

Q And that is a business that he runs with regard to selling the Christian apparel?

A I have absolutely no idea what The Buckle is and what it refers to.

Q He refers to Buckle clothing.

A I mean, I can read the posting, but I don't know if that's what – you – you are stating that I know that –

Q Right.

A – The Buckle sells Christian apparel and clothing. I don't know that.

Q Do you know that – whether he used his web page to advertise for his business?

A I don't know. I didn't know The Buckle was a business. I didn't follow – when reviewing this page, I didn't follow up on The Buckle. [83]

Q Did you – from the web page, from the photograph, were you able to determine that he sold Christian apparel and accessories?

A I can see where it says Christian and apparel and accessories. I don't – and I didn't follow up to see if that's what he'd used his Facebook page for. I can see on the picture that it says that, but I didn't put two and two together to say that, because it says that on there, this is what he's using it for.

Q I have a question specific – you have this document still up there; right?

A I do, as provided by the other counsel, yes, ma'am.

Q I have a question for you with regard to the exception which deals with business situations. The exception to this statute is under the Subsection C2. Says, "has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors."

Are you –

A I – I'm reading. Yes, ma'am. I'm – I see what you're referring to, yes, ma'am. I'm sorry.

Q If Mr. – what is, in your opinion, the word "primary" – what does that mean?

A You're asking my definition of primary? [84]

Q Well, you know, as – as the one who, you know, is, you know, making arrests on cases where there's an exception for somebody who has a – the primary purpose of the Facebook page is to facilitate commercial transactions.

A I don't – well, the way I see it is it doesn't – it's not specifically talking about the individual person's page. It's talking about the commercial website itself. A commercial social networking website does not include an Internet website that either – and then you go into Subsection 2 – has as its primary purpose.

That's – to me, I see that as being the social networking website, not the individual page or individual account that has been created by someone on that social networking website.

Q Okay. So is it your interpretation that if I was to have a Facebook web page, and all I did was advertise my business, I didn't post any personal information, no likes, dislikes, I was just selling products. Would that be out – within the statute or outside of the statute? Because I'm doing it on Facebook.

A I would say that it falls in, because Facebook itself falls in – by how I – the definition provided that it fall – to me, it falls under – Facebook falls [85] underneath the social networking website.

Q Okay. So I don't want to seem redundant; I'm just trying to understand. So if something is a commercial social networking website, it is going to be within the scope of the statute, whether or not it is geared to business as its primary purpose or whether it's geared to social activity as its primary purpose. Is that correct?

A No. It's the individual – I thought – what I thought your initial question was about an individual page or account on Facebook, and now you're saying Facebook as a whole.

Q No, I just – you're right. I'm sorry.

A So I – I –

Q I didn't characterize it well. I open a page on Facebook, and I'm just advertising my business.

A Okay. But Facebook – but Facebook itself falls – I'm sorry, I didn't mean to cut you off.

Q Right.

A I apologize.

Q No, you're right. So you're saying that anything on Facebook, if it's just social or just business or a combination of the two, is all going to be within the scope of the statute because it's on Facebook. Is that your interpretation? [86]

A So that it – well, I guess it doesn't fall under what my – I – how I interpret the exceptions. It doesn't fall under the exception because its primary purpose – because individual pages primary purpose – so I say Facebook falls under the – like I said, I think Facebook, per the definition provided on – on Subsection A – or B, I'm sorry, that Facebook falls underneath those.

Q Okay. So once it's deemed a commercial social networking website, even if the person who's accessing it or maintaining it is not using it for social networking, it would be within the scope of the law?

A It's – I guess I interpreted it, it's the – it's not what the primary purpose of the user is. It's the primary purpose of what the website is.

Q Oh, yeah. I mean, it's – the statute –

A So whether or not the user's primary purpose is to use it for financial gains, I read it as it's the primary purpose of the website, regardless of what the intended use of the – of the user is, whether they're going to use it for personal or for business.

Q Now, earlier, I – you were so kind as to let me look at the website of this British organization that is in Defense Exhibit 2, A-S-O-S, a store from Britain that has a Facebook presence. Correct? [87]

A Yes, ma'am, we did that at the table, yes, ma'am.

Q And that was a website – the business exists on the Internet and exists on Facebook, and the function of this ASOS is to sell clothes and to let people talk about fashion and share their opinions; correct?

A It – it appeared so. I mean, that's – this morning was the first time that I'd seen it, so I have, obviously, a very limited knowledge. But I mean, that's what it appeared to be when you and I looked at it. Yes, ma'am.

Q Okay. So if I'm a sex offender running ASOS, is that within the scope of the statute or the exception?

A Well, I guess it would depend on what ASOS, the A-S-O-S, what their primary function is. If their primary function is the facilitation of a commercial transaction, then per the – per what the exception states, then it wouldn't be, if that was the primary function.

Q But it's the ASOS presence on Facebook. We looked specifically at the Facebook page of ASOS, and you could buy clothes right off their Facebook page.

A We could, but we also didn't – we also didn't look to see if there was anywhere else you could access it through ASOS's website, if they have a website all by [88] themself.

Q No, it –

A We specifically looked at Facebook.

Q No. Assume they have a website, but we're not talking about it. We're only talking about the fact that for ASOS, they have a Facebook page that permits them to sell their goods. Are they within the exception?

A You would have to – again, I think we have to access Facebook to get there, and I would say no, because they are – you are accessing Facebook to get there, as opposed to going straight to the company on an alternate – by alternate means.

Q Okay. So your interpretation of the exception, which is, "has as its primary purpose the facilitation of commercial transactions," means that if it's a commercial social networking website that – such as Facebook, it'll never fall within that exception.

A I don't think Facebook falls under the exception because I don't think Facebook's primary purpose is the facilitation of commercial transactions.

ASOS's primary function might be to commercial – you know, facilitate commercial transactions, because obviously they want to make money. But the – and it – and that can be done through alternate means, not – by not accessing Facebook to get there. [89]

I'm – I would imagine. I don't know. I'm – again, first I saw it was this morning.

Q But one of the – you know, the captions for ASOS was, "Discover fashion, share with your friend, post your opinion, all on the ASOS Facebook shop." Do you remember that?

A Yes, ma'am.

Q So the ASOS Facebook shop permitted exchange of opinions, but also, really, the shop is geared to selling their stuff.

A Yes, ma'am.

Q Did you get that impression? Its primary purpose is to sell their clothes.

A That's the impression I got this morning, yes, ma'am.

Q Okay. But because it's done under the rubric of Facebook, it would be within the statute and not within that exception?

A That's how I would view it, yes, ma'am, by accessing it through Facebook.

Q You know, I wanted to just ask about a couple of the other terms that were confusing to me. For the – the first ones were accessing the commercial network. I know Mr. Gerding talked about this quite a bit.

And you said that you had charged the [90] Defendants per Facebook account. But is there any guidance, or is it completely discretionary for every single time someone signed onto Facebook for that to be a new offense?

A If there is guidance out there, I'm not aware of it. I'm going to use the I don't know. If there's guidance out there, I haven't seen it. I'm not aware of it.

As far as is it an individual charge each time? How I interpret it, each time they access it, I – I would say yes, it could be considered a separate charge.

Is that discretion or is that how I interpret it? I – I don't – I don't know.

Q And the same subsection talks about whether the sex offender knows that the site permits minor children. So there's – is the knowledge requirement, is that fulfilled only if there's a specific term of use statement that says that anyone under a certain age or over a certain age can participate? Or how does someone know that the site permits minor children?

A I guess I wouldn't – I guess I would need to refer – I don't – I don't know what previous court rulings as far as the word "knows" – I'd – I hate to use the term – you can't – that's just it. I don't know how the – how the – you can define "knows" or what [91] has been previously described as "knows," whether it's postings that are out there, what you see, what the general public sees, the terms of use. I would argue that all of those could be used to help define the "knows."

Q Well, like Glenn found this website, bettycrocker.com, which I thought was interesting. He can set up a profile, just like Facebook, and have a

photo and put out your thoughts about anything, really, even though they mostly talk about cooking.

A Yes, ma'am.

Q Now, I don't know what Betty Crocker's terms of use are, but I can't – you know, just hypothetically, if they don't say how old you have to be to be on this web page, and I'm a sex offender, how do I know whether I can go on that website?

A Well, what is – I guess if you're – if you're knowledgeable in what you can and can't do as – as the law states, and you've got a copy of this, I guess – what's the primary intent of your example, Betty Crocker?

Is Betty Crocker's website's primary intent to facilitate people talking about recipes or changing – exchanging recipes, or is Betty Crocker's primary intent to get you to buy their cake mixes, their brownie mixes, their baking products? What's primary Crocker's primary [92] intent?

Q But assuming bettycrocker.com fulfills all the requirements because they have ads, you know, from cooking companies, etcetera, for you to be able to buy their – but, you know, cooking related products.

But there's nothing in the terms of use or nothing that says you have to be a certain age to set up a profile and interact at bettycrocker.com.

And I'm a sex offender. How would I know whether I can go on this?

A I guess the non – either the – my nonofficial answer, I guess, could be if – if you don't know, don't do it.

Obviously, that's what I would tell folks out on the street. If you have a question about whether you can or can't do something, don't do it. The best way for them – for somebody not to get in trouble is to not do something.

Sitting up here and to answer your question, if – if you have questions, there are sheriff's deputies that are knowledgeable that – you know, registered sex offenders are required to ask questions of.

And if they don't know an answer, they can follow up on who can answer that question, as opposed to going in blindly just, "Well, I didn't know." [93]

And, unfortunately, in today's day and age, "I don't know" isn't an excuse on – on why you did something.

Q But if there's no definition or there's no attorney general opinion, then how is somebody – how is someone supposed to make sure they don't violate the law if you don't –

A But –

Q – if you don't know and –

A Well, you just – what definition, because there's a definition that we've been referring to all morning.

Q Like I – say, I go to you, and I say, "Look, I'm a sex offender. I want to go on bettycrocker.com and set up a profile. I see that they have no age requirements. Can I do this without running afoul of the law?"

A And all – I guess you would need to – we – we, whoever you're asking, would need to find out what the primary purpose of Betty Crocker is. Because, clearly, there is an exception written in that pertains to

commercial trans – facilitation of commercial transactions.

Q But say, assume Betty Crocker's got a bunch of ads, and they have a big dialog going so that you and I [94] can talk about recipes. But, you know, we can talk about other things and –

A Yes, ma'am.

Q – and we establish a similar view on brownies, and we want to talk about it and have a burgeoning friendship in another venue. Is that going to run afoul of the law?

A Ma'am, I'm going to say it refer – it has to go back to what the in – the primary intent of the websites – the folks that maintain Betty Crocker – (inaudible) using Betty Crocker.

Everything after the primary intent, I – I can't comment on that. All I can say is the primary intent of bettycrocker.com, in my opinion, is to – the purpose to facilitate – to facil – the facilitation of commercial transactions.

What happens outside – what happens from secondary or – purposes, I can't control. I don't know. I can't comment on that.

But in my opinion, Betty Crocker – for the example, bettycrocker.com is to facilitate commercial transactions.

Q And what exactly would primary mean? Does it mean like a certain percentage? Like, say, Betty Crocker has – wants to derive revenue and permit the social [95] activity. Forty percent is their goal and sixty percent is to have people feel more positive about Betty

Crocker as a brand, and that's their primary business purpose.

Is sixty percent primary, or is it seventy? How do you quantify primary?

A I can't quantify primary with a number, especially when speaking for somebody else's company. What might be primary to me is going to be – won't be primary to them.

Obviously, they've got folks in charge of that company that's going to set out their primary goals, primary missions and whether or not they choose to put a number on it, I don't know. What's primary to them is going to be primary – different.

Q And where it talks about minor children, now, there's different, I guess, definitions for minority. You had talked about, as a defendant, you're – you can be charged as an adult at sixteen. And it's eight – you had said that you thought it would be eighteen for the – what's a minor.

A Younger than, yes, ma'am.

Q What about twenty-one? I mean, you can't drink until you're twenty-one. Aren't you still a minor if you're under twenty-one?

A Well, you can serve in this – you can serve in [96] the military while at eighteen.

Q Well, I can get married at sixteen, but –

A Sure can.

Q – but does that mean I'm an adult? I mean, is there – what's – I want to know what minor means. Say I don't know. What do you – what is minor as your interpretation?

A I'll refer back to my answer. Minor, according to my interpretation, is under the age of eighteen.

Q And did any – there's – did you receive any sort of guidelines or attorney general opinion on defining exactly what a minor is?

A While in – while investigating – investigating these specific cases? No, ma'am, I did not.

Q Okay. So an eighteen-year-old can go on it, but not – but if someone's nineteen, then that would be safe for a person to access that website if –

A I said under the – I'm sorry. I said under the age of eighteen.

Q Okay. So if they say –

A So seventeen will be younger.

Q – "Okay, no one can sign up for this website unless you're an eighteen-year-old." And the Defendant makes contact with a nineteen-year-old. So that person's [97] not a minor?

A How – how I interpreted it? No, ma'am.

Q And with the maintaining of the web page, now I set up a web page of Facebook before the law – before this law comes into effect. Now, although I don't make any additional posts, my friends keep it going, because every time they write on my wall, it perpetuates the web page; right?

A Something is updated on your page, yes, ma'am.

Q So there'll be dates after the law is in effect, and I can't go on there to delete it because then I'm accessing it; correct?

A Correct.

Q So am I maintaining the web page because I'm not deleting it? Because the web page is continuing to exist.

A I will – I believe I commented on this earlier. I believe there is no provisions put in place to get these – you know, to have your accounts deleted without accessing it. Obviously, we don't want anybody to violate the law so that they're not violating the law, if that makes sense.

Q I understand that. Am I maintaining it by not having it deleted? I mean, am I maintaining it just by permitting my friends to continue to post on it? [98]

A I guess, as far as technical definition, as far as technology pertains to maintain, I don't know if having somebody post stuff on your page versus people posting stuff on your page versus you going out there and changing information, if that equals maintain.

But now if you're asking me my definition of maintains versus what I think the legal definition of maintains should be, obviously those are – those might be two different things.

Q Because we don't know what maintain means in the scope of the statute.

A As far as I – as far as I know, there is no definition as far as technology goes for maintains a website.

Q And where it talks about, under Subsection 2, of facilitating the social introduction between two or more persons meeting other persons or information exchanges, does that section – is that – you had described earlier a scenario where you can like a group, and then you come into contact with people that you

hadn't previously known, and then you have had a facilitated social introduction.

But if I'm only talking to my family members or people I already know, is that a social – is that – is Subsection 2 satisfied? [99]

A I guess, depending on your definition of social introduction. Does introduction have to be between the meeting of two people that don't know each other, or an introduction, a public venue for two people that do know each other to talk – to start talking again.

Well, what – what is introduction? Is it – like I said, is it meeting new people, or is it the opportunity for two people that do know each other to start interacting again?

That – it – it's not clear. The word – so it depends on what – how you interpret the term "introduction."

Did that answer your question?

Q Yeah, it does. It does, thank you.

A Yes, ma'am.

MS. NORTON-RAMIREZ: I appreciate that. I don't – I think I'm finished, Your Honor.

THE COURT: The State's examination of the witness.

CROSS-EXAMINATION CONDUCTED BY MR. McCULLOUGH:

Q I'm going to pick up right there –

A Yes, sir.

Q – where Ms. Norton left off, since we're on that train of thought. 14-202.5 Subsection (b)(2) includes, as

part of the definition of a commercial [100] social networking website, as one which facilitates the social introduction between two or more purposes – two or more persons for the purposes of friendship, meeting other persons or information gained.

Do you agree with that?

A Yes, sir.

Q And the question that I understood Ms. Norton to ask was, what if you're using the website simply to contact people you already know, family, friends you're already friends with, stuff like that.

A Yes, sir.

Q In your reading of Subsection (b)(2), is that really what it's all about? Or is it really, again, what the website's function or purpose is?

In other words, it says "facilitate a social introduction between two or more persons."

So even if you're only using the site to contact people you already know, would it still be a violation to access, for example, Facebook, because Facebook, in fact, facilitates as its function the social introduction to people, presumably who don't know each other, even if a given offender isn't using it for that purpose.

A So the question is, is it a – it was a violation if you're just interacting with people you [101] already know –

Q Uh-huh.

A – while using Facebook.

Q Right.

A I would say yes because of the functions – the primary function of Facebook and what the definition of a commercial social networking website is per this general statute.

Q So, again, in a way, that goes back to the discussion that was being had about the commercial exception. And your answer to that was, several times, if I remember correctly, that it's the purpose – the primary purpose of the website that is important and not the individual user's use of the site; is that correct?

A My interpretation – my interpretation of the exception, yes, sir.

Q I want to go back to this question, and Mr. Gerding and Ms. Norton both touched on this in some detail, or at some length.

And that is how – part of what has to be shown in order to show that an offender has violated the statute is that the offender knows that the site permits minor children to become members or create or maintain personal web pages on the site. Agree?

A Sir. Yes, sir. [102]

Q And their basic question, I think, boiled down to, "Well, how would they know?" And Mr. Gerding, and Ms. Norton, to a certain extent, went into terms of use.

Mr. Gerding, in particular, used the example of Match.com. So since we've used that forum, let's go back there.

If Match.com's terms of use indicated that persons who were eighteen years of age or older were the only ones authorized to use the site under the site's terms of use, in your opinion, would the offender be able

to rely upon those terms of use to access the site, without fearing of running afoul of 14-202.5?

A And I believe my answer – I think this is similar to a question asked earlier.

And I believe my answer was that, if Match – if Match.com fell – this is hypothetical. If it fell underneath – you know, if it went through (b)(1), (b)(2), (b)(3) and (b)(4), and it met – and it met all those – the criteria set by the State, I believe my answer earlier was that the registered offender would not be in violation until they realized that a minor was on the site and had access to the site; and at which point, once they did realize a minor had accessed the site, then any subsequent interaction on that site would have been a violation because a minor was permitted to be on the [103] site, regardless of what the terms of use were, I believe was my answer earlier.

Q I recall that, as well. And I want to dig into that a little bit deeper.

Would you agree that if a – that the word "permit" implies permission? That if I permit someone to do something, I am giving them permission to do that?

A I could agree with that statement, yes, sir.

Q Would the fact that – I'm asking you to rethink your answer for a minute.

A Yes, sir.

Q Would the fact that a sixteen-year-old had a post or an account or profile on Match.com or any other site, would that in and of itself – taking into account that the terms of use exclude that account, would that

in and of itself mean that the website is permitting the sixteen-year-old to maintain that account?

I'm just asking you to think on it.

A Right.

Q As an officer who's thinking about, say, charging the Defendants, and somehow you've come to find out, okay, Mark McCullough accessed Match.com, has an account profile there. Somehow you found out that I knew that sixteen-year-old also had an account on that day, even though the terms of use say she's not supposed to, [104] and then I continued to access it after that point.

Would you – not whether you would charge it, because I think that's too hypothetical, but would you believe it would be chargeable?

A They – I mean, building off the previous hypo – I mean it's a – all we did is build off the previous hypothetical situation, and I said – and at that point, I said, "Yes, I believe that it would be a violation if the registered offender initially didn't know that minors were on the site. And once they did know that minors were on the site, then I believe it would be a violation if – as long as that site met(b)(1), (b)(2), (b)(3), (b)(4).

Q So the fact – the fact that the sixteen-year-old has an account profile on the site, in your opinion, imputes permission to the website.

A I guess, since there are no safeguards in place to insure that they aren't, I guess – I guess I would say that, yes, permission – or the permitting – since it's still there and still on there, that I would say that they – they are permitting it to be there.

Q Would you call them and ask?

A Would I call – would I call Match?

Q Yeah.

A In this situation? I did not in any of the [105] other situations, so I wouldn't – I couldn't venture to say that I would or I wouldn't. I can tell you based on what I've done in the past, and – and I did not call, you know, Myspace and/or Facebook.

Q Well, in this case, we're talking about Facebook and Myspace, which I think everyone concedes –

A But – but all I can do is base, you know, my future actions on – on experiences and training in the past.

Q Right. Well, and Myspace isn't – I guess the point I'm trying to get at is, when you talked – either you talked to Myspace or you got something from Myspace that said if they become aware that a sex offender is on the – has posted an account, has created an account or maintained his page on their – on their site, they delete it.

A Correct, sir.

Q All right. So in the hypothetical we've been using, what if Match.com has a similar policy?

A I know that – well, I know Facebook has –

Q With regard to minors not setting up, and keeping it in the context of minors. What if Match.com has a policy that says, "Well, if we find out there's a sixteen-year-old or anyone under eighteen, we delete that account"? [106]

A Would I, as a law enforcement officer, contact Match.com and tell them? Honestly, probably no, because there's no criminal law that's been violated as

far as a sixteen-year-old accessing Match.com, whereas in this case, specific, why I'm up here right now, there is a violation of the North Carolina general statute that prohibits registered sex offenders from accessing commercial social networking websites, which is why I contacted both of them to have these accounts deleted pursuant to my investigation.

So, no, I wouldn't have contacted Match to tell them there's a sixteen-year-old, no, sir.

Q But there is a criminal statute which has been violated, not by the sixteen-year-old, but at least potentially by the offender.

A In – in your hypo – in the hypothetical situation?

Q In that case.

A How I –

Q Which requires –

A – interpret? Yes, sir.

Q I'm sorry. Which requires him to know that the site permits minors to maintain vigilance or maintain the account fully.

A Yes, sir. [107]

Q Now, there's been a lot of discussion about sort of what constitutes the commercial social networking website. There's been discussion of front pages, main pages, subpages and the like.

And I think we've gotten a clear answer from you with regards – at least with regards to Facebook – correct me if I'm wrong – that basically any access by an offender of anything on Facebook, even Governor

Purdue's website – Governor Purdue's page on Facebook, would be a violation.

A I believe so, yes, sir.

Q What about – what about Google? That was the other example that Mr. Gerding used. I think you said, when he asked you that question about Google, that accessing the front page –

A Yes, sir.

Q – which is just the search –

A Search engine.

Q – function page –

A Yes, sir.

Q – that that would not be a violation.

A Not how I interpret it, no, sir.

Q Even though there are links at the top, describe what – you're familiar with what the front page of Google looks like; right? [108]

A Just long enough when I opened up the search engine to type in my question into the box and hit enter, sir.

Q Do you remember the –

A But otherwise, I've never navigated it, I've never had a gmail account, I've never –

Q Yes. Do you know – have you noticed that there are links at the top?

A Honestly, most of the time, at the top, I notice that about every – every season change. There's a new type of picture displayed at the top. I mean that's – all

I'm – that's about the most that I pay attention to the top of Google, sir.

Q It's all right.

MR. McCULLOUGH: Approach the witness?

THE COURT: Yes, sir.

Q From Defense Exhibit No. 1 – actually, I'm just going to hand you this first page, which for identification purposes, for the record, at the top it says, "http:\\www.google.com" described as home page, email, blogs, photos, U-tube groups.

Handing you that from Exhibit – Defendant's Exhibit No. 1.

THE COURT: What page is that in Exhibit 1?

[109]

MR. McCULLOUGH: Ninety-four.

WITNESS: Ninety-four, Your Honor.

THE COURT: Thank you.

CROSS-EXAMINATION RESUMED BY MR. McCULLOUGH:

Q If you'll look at the top, you'll see the – do you see the search engine sort of in the middle of the page?

A I do, sir.

Q And if you look at the top left, do you see other links?

A I do, sir.

Q What are they?

A Reading from left to right, web, images, videos, maps, news, shopping, gmail, and then a drop box

under "more," with another pick list of different options to choose, sir.

And then, all the way across to the far right, a sign-in tab.

MR. McCULLOUGH: Approach?

THE COURT: Yes.

Q I'd also hand you pages 95 and 96.

A Yes, sir.

Q And tell me if you agree that this – these are screen captures of basically what's contained under that "more" tab that you were talking about. [110]

A I've never used it, but I mean, it appeared to be, according to the Internet address at the top, after Google.com\in – i-n-t-l\e-n\options, it appears to be the – on page 94, at the bottom of that pick list, it shows "even more."

And this would – it appears to be that's what would come up.

Q So it's –

A That's what I would reason would come up.

Q – a listing of other categories is what it boils down to, though.

A Appears to be, yes, sir.

Q Do you see a listing for – or a link or a listing for groups on there anywhere?

A Under the "more Good products," I'm looking on – I'm looking on page 95, right side of the page, it shows a bold heading of "communicate, show and share." The fourth link underneath that is "groups,"

with an arrow next to it. I believe the arrow was added after the screenshot was done.

Q Right.

A "Create mailing lists and discussion groups."

Q Now, the fact that those links or the – or a person's ability to navigate from the home page of Google to any one of those things, if one of those things meets [111] the statutory definition of a commercial social networking site, would that change your answer with regard to the front page of Google?

In other words, does the front page of Google qualify?

A I don't believe the front page – I don't interpret the definition under (b)(1), (b)(2), (b)(3) and (b)(4), as Google falling underneath that. Now, a page off of Google may, if – as long as it hits (b)(1), (b)(2), (b)(3) and (b)(4). It – it –

Q That would –

A – falls under all four of those.

Q All right. That was my next question.

So if – what would be something on there that, at least on its face, might qualify under the statute as meeting Subsection B requirements for meeting that definition?

Would groups potentially qualify?

A I'm sorry. Yes, sir. I'm sorry, I was looking at – I was looking at page 96, which just had different –

Q Okay.

A – different choices, sir.

Groups. There was a – just looking on the face, ORKUT, "meet new people and stay in touch with [112] friends."

Now, whether that allows – I don't – I don't know whether that allows you to create a personal page or just speak with other folks, I don't know. So I don't – you know, without looking into ORKUT to see if it – it meets, yeah, Subsections (b)(1), (b)(2), (b)(3) and (b)(4), but just –

Q Assuming –

A – looking on the face of it.

Q Assuming, for sake of argument now, that ORKUT, for example, meets the definition –

A Yes, sir.

Q – if a person navigated away – if an offender who was supposed to not violate the statute, navigates away from Google.com, the front page, to ORKUT, have they violated the statute?

A And we're saying that ORKUT does –

Q For sake of argument –

A – satisfy (b)(1) through (b)(4)?

Q Right.

A I – I would interpret it as – I would say that yes, they have violated the statute, sir.

Q So if Face – I'm going to draw a distinction now.

Because Facebook, what I'm understanding, your [113] interpretation of the statute – as a law enforcement who might charge under the statute, your interpretation of what Facebook is, is that Facebook in

its entirety, any access of Facebook, no matter what part of Facebook, is a violation of this statute.

A That's how I interpret it, yes, sir.

Q But not necessarily true about Google.

A Correct, sir.

Q So there are certain parts of Google's global website that could be accessed without violating the statute, but other parts that could.

A Yes, sir.

Q In other words, I'm drawing a distinction between main pages and subpages.

A Yes, sir.

Q So it is possible that a person could – could access any given website without violating the statute, but navigate to another part of that website and essentially run afoul of the statute.

A I could agree with that statement, sir.

Q Mr. Gerding and Ms. Norton, both, went into some questions about how we know what a minor is.

A Yes, sir.

Q We're talking, obviously, in here in the context of criminal law. [114]

A Yes, sir.

Q You've been on the – you've been in juvenile investigation.

A Yes, sir.

Q And now you're in homicide investigations.

A Yes, sir.

Q And you've been with the police department in Durham since October of 2001.

A Correct, sir.

Q Other than charging defendants who are sixteen or seventeen as adults, can you think of any other time when the definition of a minor, in the context of the criminal law, is not eighteen?

A In criminal law, no, sir. Not that I can – not that I can think of, sir.

Q Mr. Gerding was asking you questions – toward the beginning of his examination, he asked you why – why you chose Myspace and Facebook.

A Yes, sir.

Q And, in fact, in the seven or eight cases that you charged, were they all in Myspace and Facebook violations?

A Well, not each – I mean, each case was one or the other. I mean, all – all the investigations that I did pertaining to registered sex offenders illegally [115] accessing commercial social networking websites pertained to either Myspace and/or Facebook. There were no other social networking websites that I looked into.

Q And when he asked you why, you said because they're the most common ones you've heard of, generally. Not necessarily in police work, but just as a general proposition, the ones you heard the most about –

A Yes, sir.

Q – were Myspace and Facebook. If someone came up to you and said, "I saw John Sex Offender posting

comments on bettycrocker.com," would you run off to investigate that? Just talking about recipes and stuff, but he was on the site.

A And – and it's – are we still referring back to my comments that I don't think that bettycrocker.com falls underneath a commercial social networking website because of what its primary function is as pertains to the exception? No, I wouldn't go investigate it, sir.

Q Well, and that's why; right?

A Yes, sir.

Q Because you don't consider bettycrocker.com to meet the statutory definition.

A On – per the except – based on the exception, no, sir.

Q Because you didn't – because in your [116] professional opinion, bettycrocker.com's primary purpose is the facilitation of commercial transactions.

A Yes, sir.

Q Are you familiar with Amazon.com?

A I believe it's a website where you can purchase items, sir.

Q Ever been there?

A I believe I purchased some books – books off of there a few years ago, sir, but – but not on a regular basis, no, sir.

Q But you know what the – you know what the website is.

A I believe it – it's there for people to buy items off the Internet, sir.

Q I'm going to show you page 163 from Defendant's Exhibit No. 1, which is the front page of Amazon.com.

If you'll look at the top – and this is a black and white picture but, you know, where the blue sort of description bar across the top would be.

A Yes, sir.

Q On the left of that blue bar, what does it say across there?

A "Amazon.com: on-line shopping for electronics, apparel, computers, books, DVDs and more, windows Internet explorer." Is that the line you're referring [117] to, sir?

Q Yes, sir.

MR. McCULLOUGH: Approach?

THE COURT: Yes.

Q I'm showing you now pages 165 through 169 of Defendant's Exhibit No. 1. And you'll see arrows that Mr. Gerding has added to these for demonstrative purposes.

I'm going to hand you those. And on each of those pages, if you will, just tell me what you see by the arrows on those pages of the exhibit.

A Yes, sir. Page 165, under the block "settings," or titled – appears to be titled "settings" on the left, right side of that block, subsetting "address book," arrow next to the "manage address book" link, there's an email from Amazon subsection. The link with an arrow next to it says, "email preferences and notifications."

Bottom of the page, block entitled "personalization." Under "community," the link for "your public profile," there's got an arrow. That's the end of 165.

166, under the "create your profile," your page on Amazon, there's an arrow, "connect with Amazon friends and interesting people." That's the end of page 166. [118]

167, "Share more about yourself." There's a listed – there's a list – or there's an option to put a web page, and listed is www.GerdingLaw.com. It's the only arrow on page 167.

168, "Share more about yourself." The arrow appears to go to the shaded-in box, not to a specific link. The box is "select photo of your – from your computer." There's a place to attach photographs and add captions. And then there's a terms and conditions waiver that you need to address before it allows you to post a picture.

And on page 169, under "Amazon content submission agreement," under "eligibility," – would you like me to read the entire paragraph under "eligibility," sir?

Q No. Just read the clause that refers to the age restriction.

A The last sentence under – in the "eligibility" paragraph states, "Further, you may not submit any personally identifiable information about any child under the age of thirteen."

Q Now, again, you're not a frequent user of Amazon.com.

A Like I said, I believe I've used it one time to purchase some books for work, sir. [119]

Q So I suppose this – this could be instructive because of your lack of personal knowledge of Amazon.com.

If someone brought to your attention that a sex offender was – had created a profile on Amazon.com, they accessed some of those links to connect with friends or others, or posted reviews about products or any of that, and you went to Amazon.com, first –

First of all, what would be your initial inclination?

What would be your initial thought about the fact that somebody had a profile on Amazon.com?

A I believe per – based on my – my answer before that the art – or the act of accessing Amazon.com wouldn't violate general statute 14-202.5, Subsection A, in my belief.

But there could be subsections of Amazon.com that could violate it, if it fell within (b)(1) through (b)(4).

Q All right. So that's all you know right now.

Now you've decided to check into it further, and you go to Amazon.com, and you navigate your way around, and you find these pages that you've looked at.

Would you – based upon what you've seen there, in your professional opinion, cause you to charge a person for accessing any of those subpages? [120]

A I would say that, based on my previous – I think I answered previous, that the website, Amazon.com's primary definition is to facilitate the

transaction of goods. And – and because of that, Amazon was cleared.

And if the person was accessing Amazon, and Amazon was cleared – I would say if the subsections fall within (b)(1) through (b)(4) and did not fall under the exception – if the subsequent pages didn't, then they would be in violation.

Q Now, all of those pages – and you might have to – you'll have to go back and look at these.

If you look at the address bar on each of those pages, do they all begin with Amazon.com, with all that credit stuff, www. But are they all subpages of Amazon.com?

A Yes, sir.

Q Would you believe, then – so they're subpages of Amazon.com.

A Appears to be, yes, sir.

Q And you said before that Amazon.com would fit within the commercial exception.

A Yes, sir.

Q I'm just asking your professional opinion. If Amazon.com's – if Amazon.com, as a business, has as its primary purpose in maintaining its website the [121] facilitation of commercial transactions, would the fact that it also permits the creation of accounts and profiles and things like that, would that not also fall within the commercial exception?

A Yes. Actually, yes, it would. I said earlier that I didn't think it would, but no, I believe it would.

As long as the primary purpose of the website is to facilitate financial transactions or commercial transactions, I think it still would fall the – under that.

Q So there's a broader concept, then. It is – it is possible, then, for websites to have subpages that might, if taken – if taken in a vacuum, would meet the definition as set out in Subsection B.

But if you take it out of a vacuum, and you look at the site's primary purpose, and you determine that the site's primary purpose is a commercial one, then accessing that site and even those subpages would not violate the statute.

A In – in my professional opinion, no.

MR. McCULLOUGH: No further questions.

THE COURT: Mr. Gerding's redirect.

MR. GERDING: Thank you, Your Honor.

REDIRECT EXAMINATION CONDUCTED BY MR. GERDING:

Q Corporal, I want to ask you some specific [122] questions based on some Ms. Norton asked and some that the State asked you, as well.

Starting with Ms. Norton's questions about the use of Facebook for business purposes –

A Yes, sir.

Q If a registered sex offender owned a business. Let's say he owned a bicycle repair business, and wanted to have a presence on Facebook for his business. But he knew, after talking to you or someone at Durham Police Department, that he should not access Facebook.

Could he, nonetheless, have employees create a Facebook page for his business and run it for posting personal information, including his name, because his name is the owner, and those type of things – would a business owner be allowed to use Facebook for his business if he did not individually sit down at the computer and access it?

A I guess – I will refer back to my answer before, that the – as it pertains to Internet websites, the definition of the word "maintain," which is in the – which is in the general statute, is not clear on whether it's the individual maintains it or the individual has somebody maintain it.

Using the police as an example, if I know I can't go into your house, but I ask the ADA, who is not a [123] sworn law enforcement officer, "Go into his house and do this for me," he is acting as my agent; therefore, he is subject to all rules that I have to follow.

So if I apply the same logic reversely, if – if a registered sex offender asks somebody to do something that they can't do by accessing or maintaining the page, are they responsible – are they responsible or have they met the definition of maintaining a page?

I – again, I don't have enough law school knowledge behind me to accurately answer that question. So the answer I've given you is the best I'm – the best I've got.

Q So in other words, it might depend on how the definite – how the word "maintained" is defined. If it means individually access – individually going on the computer or directing someone else to.

A As far as that hypothetical –

Q Yes.

A – situation, sir? I can agree with that statement.

Q Okay. The second question along similar lines, but let's reverse it.

Let's say a business owner who is not a registered sex offender, no criminal record, they own a bicycle business, but they have an employee who is a [124] registered sex offender as an employee of the business. And they have – the business owner has a Facebook presence.

Can they have their employee, who is the registered sex offender, go on-line and update the business information on the Facebook page, or would you consider that to be accessing and maintaining a Facebook page?

A Well, I would say that it's a violation and – and the law – it doesn't say that there – there's not an "and." It's access or maintain.

So just the mere fact that they have access to the site, regardless of intent, because the statute doesn't imply anything about intent. It doesn't say that the person went on there to do business. They went in on there to do personal matters. They went on there to do, you know, illegal – you know, to try to – I'm – I'm not implying any of that.

All I'm saying is that it doesn't specify intent. All it says is that it was accessed, a commercial net – a commercial social networking website.

So I would say that if it – if done even under employment reasons, an employer said to do this, I would say that it would still be a violation, sir.

Q I want to now move onto the questions from the [125] State regarding Betty Crocker and also Amazon. And I want to invite your attention to Subsection C of the statute which we've been talking about.

A Yes, sir.

Q Subsection C2. The subsection says that, "It has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors."

A Yes, sir.

Q Is that accurate?

A Word for word, yes, sir.

Q So in your discussion with the state about the Betty Crocker website, let's say that Betty Crocker does want people to look at their website so that they buy products from Betty Crocker.

How would that fit in the definition or – or the exception of Subsection 2, which talks about commercial transaction between members or visits, not between members, visitors and the website company, the company on the website?

Am I misreading the statute?

A No, I think – I think, again, it's down to interpretation, whether you're talking about facilitate the commercial transactions of all the goods or services between its members. [126]

It doesn't say "and itself." It doesn't say "its members and each other" or, you know, "other members."

It's not clear on whether they're talking about transactions between members and the parent company, being Betty Crocker, or member A selling something to member B, or a visitor buy from either one of those two or from the company itself.

Q Is something that you would look at in determining that primary purpose maybe the terms of use or the statement on the website itself as to the purpose of the website?

A Those would be areas that I could look at, yes, sir.

Q So if the Betty Crocker website said the website is owned and provided by General Mills, and it's provided for your personal entertainment, information and education, and then there's nothing in the terms of use which says, "We want you to buy our products," do you think those terms of use would at least be persuasive as to whether the primary purpose was to cause people to buy the products or, alternatively, to enjoy the social aspects of talking about recipes?

A I guess I would reason that it would be – or it could be – or I guess it would be reasonable for [127] someone to – anyone could conclude that Betty Crocker, just from life experiences about -- you know, concerning baking, that – I'm not – I – I don't want to use the word "assume."

But you could conclude that Betty Crocker – and a – a website about Betty Crocker would be about Betty Crocker products and recipes and things of that nature.

Therefore, a big conversation about Myspace and/or Facebook would be about those specific

networking websites, just on, I guess, common known – and when I say known items, just common beliefs.

Q Would you agree – and, again, I'm guessing you're not too familiar with the Betty Crocker website, but –

A Never been there, sir.

Q Okay. But as far as a website like Amazon.com, where you go to the front page and basically you are presented with goods for purchase –

A Yes, sir.

Q – as opposed to a Betty Crocker website where that's not what you see on the front page. And I've got screenshots of this, Defense Exhibit 1, page 2, page 3, page 4. There may be advertisements on there, but it's not links for actually purchasing products. [128]

Could you see a distinction between a website like Amazon and a website like Betty Crocker, where one is more about product information and another is about product sales?

A Based on – based on the screenshots that I've seen, I think what – I think you can infer that, or you can make a reasonable, I guess, assumption, or a reasonable judgment or a decision about – about one versus the other, based on what you can see. Yes, sir.

Q And so along those lines, I'll ask you with Amazon.com, as well. Do you have enough familiarity with Amazon.com to know whether that website facilitates commercial transactions between the company, Amazon.com, and visitors, or its primary purpose is to facilitate commercial transactions between visitors to the site than themselves?

A I can – I can only refer back to, like I said earlier, a personal experience where I believe I – believe Amazon.com was where I purchased a few books for work. But that was four year – four or five years ago. So nothing recent. But that was my only interaction with the website was – was for purchasing books.

So as far as person A selling something to person B, I don't know. I know that I – I believe I purchased some books from the website. [129]

Q Stickin with Amazon.com, the State was asking you questions about if the website, sort of as a whole, is determined by you or whoever is investigating, to fit within one of these exceptions, then it doesn't matter if there are subpages which might otherwise meet the definition.

Is that an accurate representation of what you said?

A I believe it is, yes, sir.

Q So, in other words, if Amazon.com and some of its features for people to talk to each other or communicate and be social, let's say Amazon.com had subpages which, in essence, were virtually identical to Facebook, let you put up pictures, do everything that Facebook lets you do, but it's just a subpage behind one of those backslashes.

Starting with Amazon.com, you're saying a sex offender – registered sex offender could have free rein on there, but couldn't on Facebook.

A Based on my interpretation of – of the law, how it's written and the exceptions that are included, that's my interpretation of it, sir.

Q So a registered sex offender could not get on Facebook and do email chat and those things, but could get on an identical subpage of Amazon and do those [130] things?

A Based on my interpretation of the law and based on my interpretation of what the primary functions of the two separate sites are and how they – they are defined per what the State has given me, yes, sir.

Q And I think you said the same thing about bettycrocker.com, that if somebody called and said, "Hey, we know that registered sex offender Joe is logged in to bettycrocker.com, talking about recipes," that wouldn't pique your interest to investigate; right?

A Based on the information that I had and – and how I interpret the exceptions and the definition, no, sir. It wouldn't – it would not get my interest, no, sir.

Q What about if the registered sex offender had started a thread that said, "I like little girls, and I want to talk about that"?

A As a – as an investigator? I would probably forward that information to our Internet Crimes Against Children Unit, where we have an investigator specifically assigned to monitor that sort of thing.

And there might be other North Carolina general statutes that have been violated.

But as it pertains to this specific statute, I wouldn't be looking at this specific one, but there might [131] be other ones that might either have been violated or, you know, might be violated in the near future.

So that – you know, there are other avenues, as a law enforcement officer, we could intercede as far as public safety goes, sir.

Did that answer your question, sir?

Q Yes, it did. You also mentioned, in response to the State's question regarding the definition of "minor," that in the criminal context, you weren't aware of anything where a minor was anything other than seventeen and below – so under eighteen – except for charging juveniles. That was the only exception you came up with when the State was asking you, as far as some –

A And – and while you're asking the question, the one thing that I can think of as – as far as it pertains to a person under the age of twenty-one being considered a minor could – and not a suspect, could be like – something like alcohol sales.

You know, if you were looking at a business that were selling – that was selling alcohol. But that would be considered somebody under the age of twenty-one. Not using the term "minor," but under that age.

But otherwise, as far as a – other than defendant, under the age of eighteen, sir.

Q Are you familiar enough with statutory sex [132] offenses to know that the age of consent for sexual intercourse and other sexual activity is age sixteen?

A Yes, sir.

Q So in that context, that would actually be an additional area of the criminal law where a minor is actually younger than eighteen – I'm sorry – is younger than sixteen?

A Now, are we talking – are we talking about the minor as a suspect or the minor as a victim, when you – when you're using the term "minor" and then talking about sex offenses – sex offenses and ages?

Q Well, I had understood that the question and answers from the State to you about the context of the term "minor" or knowing what a minor – how a minor was defined in a criminal context, it sounded like you said the only area in the criminal context that you knew of where a minor was anything other than someone under eighteen was a defendant could be charged as an adult.

But that was the only area of the criminal law where you knew that someone sixteen and seventeen was not considered a minor. They were considered an adult.

A Okay.

Q But isn't it true, in the context of statutory sex offenders, that that is an area of the criminal law where an adult is sixteen and seventeen and eighteen and [133] on up?

A Yes, sir.

Q So does that affect your consideration of what a minor might be?

A I would still lean – I would still stand by my – as far as this statute pertains – as far as this statute was, that my belief on a minor was still the age of eighteen, sir.

Q So, hypothetically, if there's a website that meets this full definition of commercial social networking website, that's not in question.

And their terms of use are that a person has to be sixteen or older to access the website, are you saying that that would be off limits to a registered sex offender because, under your definition of a minor, sixteen to seventeen-year-olds are permitted on that website?

A If we're looking at our hypothetical website, and if those were the terms of use, I would – still hypothetical – I would seek additional guidance as what the State would mandate was a juvenile.

Facebook and Myspace, I know from experience, allow younger than sixteen to access.

So if it – if it's specifically stated out, sixteen and above, I believe I would try to seek [134] additional guidance as to what – what the State would say would be – would define that minor, sir.

Q Even though, right now, you think and have testified that you think that a sixteen and seventeen-year-old would be a minor under this statute?

A Correct.

Q You'd probably seek additional guidance.

A If – if under the terms and if, you know, hypothetical situation, those terms and usage terms specifically stated that age, yes, sir.

MR. GERDING: I don't have any other questions, Judge. If I may just approach and get my copies.

WITNESS: Oh, yeah.

THE COURT: Yes.

We're at the midpoint of our afternoon session, the time being 3:26. Mr. Bailiff, we'll take a recess until 3:45.

BAILIFF: 3:45. The court is recessed until 3:45.

(Court in recess from 3:26 p.m. until 3:45 p.m.)

* * *

(Court resumes.)

[134:24]

THE COURT: If the parties in the Johnson/Packingham matter will come forward again, and [135] the witness may resume the witness stand. We are now returning to the present case, as we took a recess for the unrelated jury trial which has now come to an end. And I thank counsel for their patience as we resolved that matter in full.

In terms of this matter, I'll remind you that you're still under oath.

WITNESS: Yes, Your Honor.

THE COURT: And, Mr. Gerding, you had completed your redirect, I understand; is that correct?

MR. GERDING: Yes, Your Honor.

THE COURT: So for the Defendant Packingham, Ms. Norton-Ramirez, you may have your examination.

MS. NORTON-RAMIREZ: Your Honor, I have no additional questions.

THE COURT: All right. Thank you.

Recross, the State.

MR. McCULLOUGH: Approach the witness?

THE COURT: Yes.

MR. McCULLOUGH: I have this printed out.

RECROSS-EXAMINATION CONDUCTED BY MR. McCULLOUGH:

Q Showing you what is – showing you page 20 of Defendant's Exhibit No. 1 –

A Yes, sir. [136]

Q – do you see a red arrow?

A I do, sir.

Q And that is what Mr. Gerding had you read out with regards to education, entertainment, etcetera. "This website is being provided to you for your entertainment, education."

A I don't believe I read it. I believe he alluded to it, yes, sir. I mean, I believe he stated that, but I didn't – he didn't have – I don't believe he had me read it.

Q Below that, do you see where it says, "United States"?

A "United States only," yes, sir.

Q Will you read that paragraph?

A Yes, sir. "Unless otherwise specified, the materials in this website are presented solely for the purpose of promoting products or programs available in the United States, its territories, possessions and protectorates. We make no representation that materials in the site are appropriate or available for use in other locations. If you access the site for locations other than the United States, you are solely response" –

I'm sorry. "You are responsible for compliance with any applicable local laws."

MR. McCULLOUGH: No other questions. [137]

THE COURT: Mr. Schnee, you may step down. Thank you.

WITNESS: Yes, Your Honor.

THE COURT: Further witnesses, Mr. Gerding, for the Defendant Johnson?

MR. GERDING: Yes, Your Honor. I'd like to call Christian Johnson to testify.

(Christian Johnson is sworn at this time.)

MR. GERDING: And, Your Honor, before he testifies, I would like to mention to the Court that I am having him testify as to preliminary matters in the case related to the facts that I set forth in my motion.

I believe, pursuant to rule of evidence 104, my understanding of that is that he is entitled as a Defendant to testify on preliminary matters and may not be cross-examined on other matters which are not related to substance of the preliminary matters.

I just want to state that at the outset, just to make sure that the State doesn't have some other interpretation of that rule of evidence and have any intention of cross-examining him on matters outside of what I'm questioning him on direct, which will only be about facts which establish one of the bases for my challenge in this motion.

THE COURT: Do you intend to confine your [138] questions of this witness to just that area?

MR. GERDING: Yes, Your Honor.

THE COURT: Thank you. What's the State's position on that?

MR. McCULLOUGH: The State will confine its cross to the scope of direct.

THE COURT: All right. It's recognized.

Christian Johnson, being first duly sworn, testifies as follows on direct examination conducted by Mr. Gerding:

Q Good afternoon. Could you tell the Court your name, please?

A Christian Martin Johnson.

Q And are you the Defendant charged in this case that we've been hearing today?

A Yes, I am.

Q Mr. Johnson, I want to direct your attention to when you were charged in this case. And are you aware of the charge that you have in this case?

A Yes.

Q And the charge is that you have maintained a website, a page on Myspace.

A Yes.

Q On the date that you were charged with that offense, were you working? Did you have employment? Did [139] you have a job?

A Yes.

Q And what was your job?

A I was working as a contractor for a company in Durham, called "iContact." I was a quality assurance analyst, a software development team, and I was responsible for software, testing any changes that my team made relative to the company's software, which was email marketing.

Q On the date that you were charged with this offense – I'm sorry. On the date that you were arrested and charged with this offense, were you, as part of any of your employee responsibilities, required to access Facebook or Myspace?

A I hadn't up to that point. But the following Monday, we were starting a project that was going to require integration with social media, specifically Twitter and Facebook.

Q And when you say the following Monday, you mean the Monday following –

A Oh, yeah. I was arrested on the Friday, the 23rd of July. So that was the end of the week. And so the following Monday was the start of a new software development life cycle, and we'd be taking on new projects. And my – my new project was to – was to be [140] part of an – the company's integration with Facebook and Twitter.

Q And when you say the company's integration with Facebook, that would not have been a personal Facebook page that you would have had to create; was it?

A No.

Q What would those responsibilities have required you to do as part as your plan?

A I would have had to test that the software was in the company software application correctly linked to Facebook, that information that it was placing on Facebook or that it was gathering from Facebook was accurate, so – and vice versa.

Or that somebody could use the company's software to publish directly to their Twitter account or to other social media or – or use from within the company, software could go directly to their Myspace page – or their Facebook page. Excuse me.

Q As part of your job responsibilities on that new project, would you have had to log into – first of all, would you have had to type into an Internet browser, www.Facebook.com?

A Yes.

Q And what would you have been required to do after that, as part of your job responsibilities? [141]

A As we had discussed on my team, that we would create a test account for the team, that we would log into and access, to verify information fidelity essentially was being sent properly between the two systems and applications, that integration was happening, you know, per our design.

So I – yeah, I would have to log into that – that test account.

Q Did you, in fact, do any of that?

A No. We hadn't created the test account. We were – that we – our software development cycles were regular, and the next one was about to start on Monday, and that would be part of our software development cycle.

Q What did you do that Monday or that week, which was after you had been charged, in response to the news from your employer that you were going to have to somehow be involved with accessing Facebook?

A Well, I never – I never really saw Monday. Because on Saturday, after I was released from the Durham County Jail, I contacted my employer, Synergy, because I was a contractor, to make them aware of my charge. And to also let them know that I – I wasn't comfortable working on this project and – because of, you know, the access to social media, and that I was going to need to move to another team that wasn't working on integration [142] or social media.

Q What was their response to that?

A They didn't take it well, obviously. They were concerned that I'd been recharged and that – and that the difficulties associated with – with changing teams, and that they didn't – they said that it wasn't going to be –

Well, after some deliberation, they got back to me on Sunday and told me that that wasn't going to be acceptable, and that I wasn't going to be able to remain on the team if I couldn't continue with that project. I couldn't switch teams to a nonsocial media related team. That was vital to my employment.

Q So a requirement for your continued employment was going to be that you had to be able to work or access Facebook?

A Yeah, for – I had to, yeah, be able to complete those projects completely, by accessing the social media sites.

Q So at that point, did you return to that job at all?

A No. They – they laid me off. I went in on Monday to just collect my personal effects, and made myself aware that if there – if an opening came up on one of the other teams, I would be open for that. But [143] there presently was – was none, and so – so, yeah, so my employment ended.

MR. GERDING: I don't have any further – any additional questions.

THE COURT: Cross, Ms. Norton-Ramirez?

MS. NORTON-RAMIREZ: I have nothing.

THE COURT: Cross, the State.

CROSS-EXAMINATION CONDUCTED BY MR. McCULLOUGH:

Q Mr. Johnson, so your understanding of the charge you're here under, that you're accused of accessing or maintaining a website which was related to your employment?

A No. I was – I was – but the terms were so – so hazy to me, I didn't understand the – I thought the terms under which I was charged seemed so confusing to me that I wasn't willing to risk any type of threshold of accessing any social media, even through work, without, obviously, disclosing that to my employer and making them aware of that.

And as we've discussed today, it would be a violation. And so – so that was sort of a – the proper thing to me. I just wanted to be safe.

I didn't want to be in a situation where I had a good argument to win it. I wanted to be in the situation where I wasn't to get in trouble. [144]

Q But at the time you were charged and now –

A Uh-huh.

Q – you understood and understand that that's not what the charge is, of accessing any business – a Facebook page related to the business or working?

A No – yeah.

Q In fact, you were charged for maintaining a site on Myspace which had a – an account identifier of CMJ?

A Yeah.

MR. GERDING: Objection. I don't think the cross-examination as to any of the matters regarding what he's charged with is relevant to the preliminary matter, which is what I'm establishing with these facts. I mean, I think it's a –

THE COURT: Sustained. Sustained.

MR. McCULLOUGH: Nothing further.

THE COURT: Any further redirect?

MR. GERDING: No, Your Honor.

THE COURT: You may step down, sir. Thank you.

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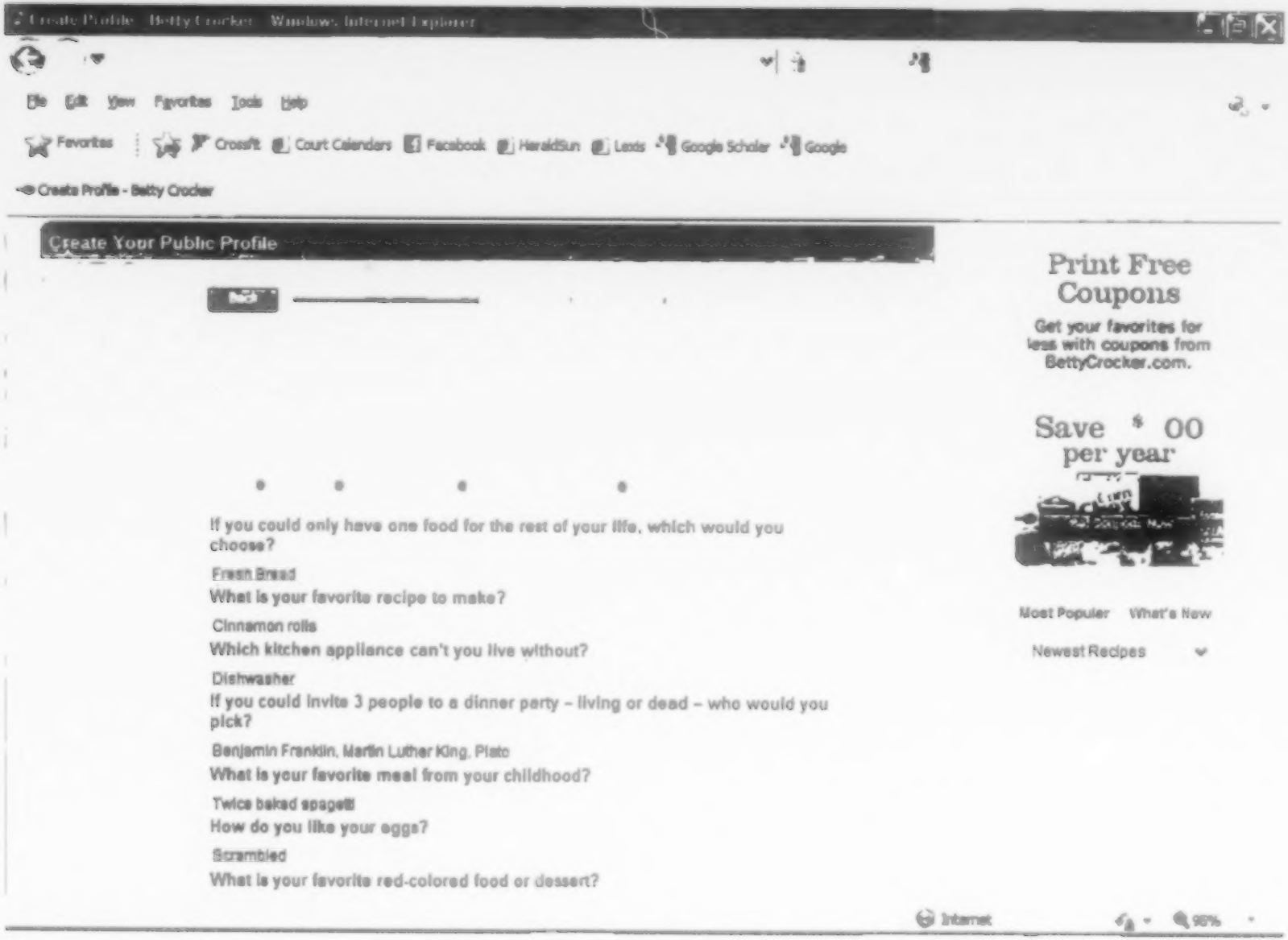
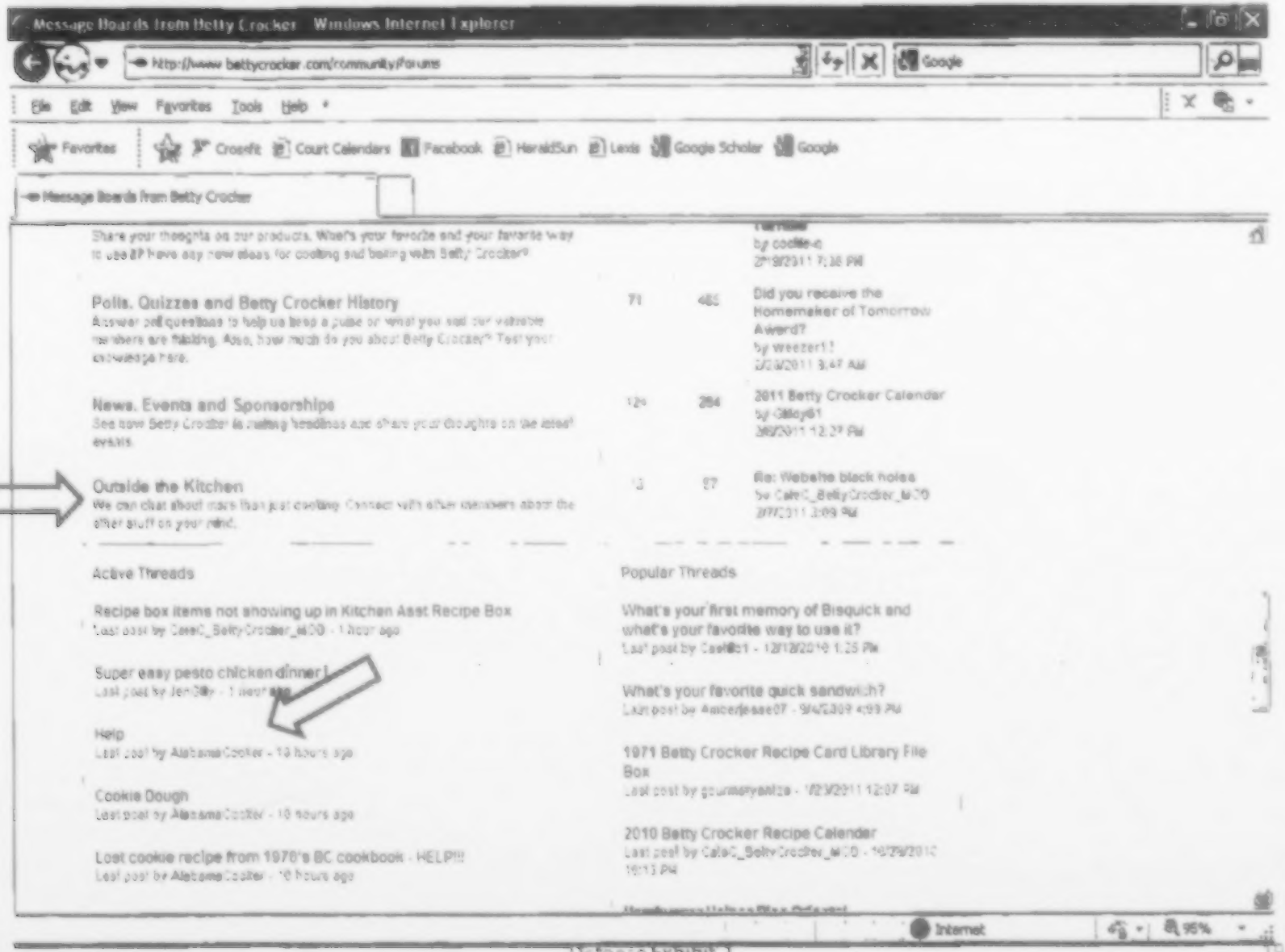
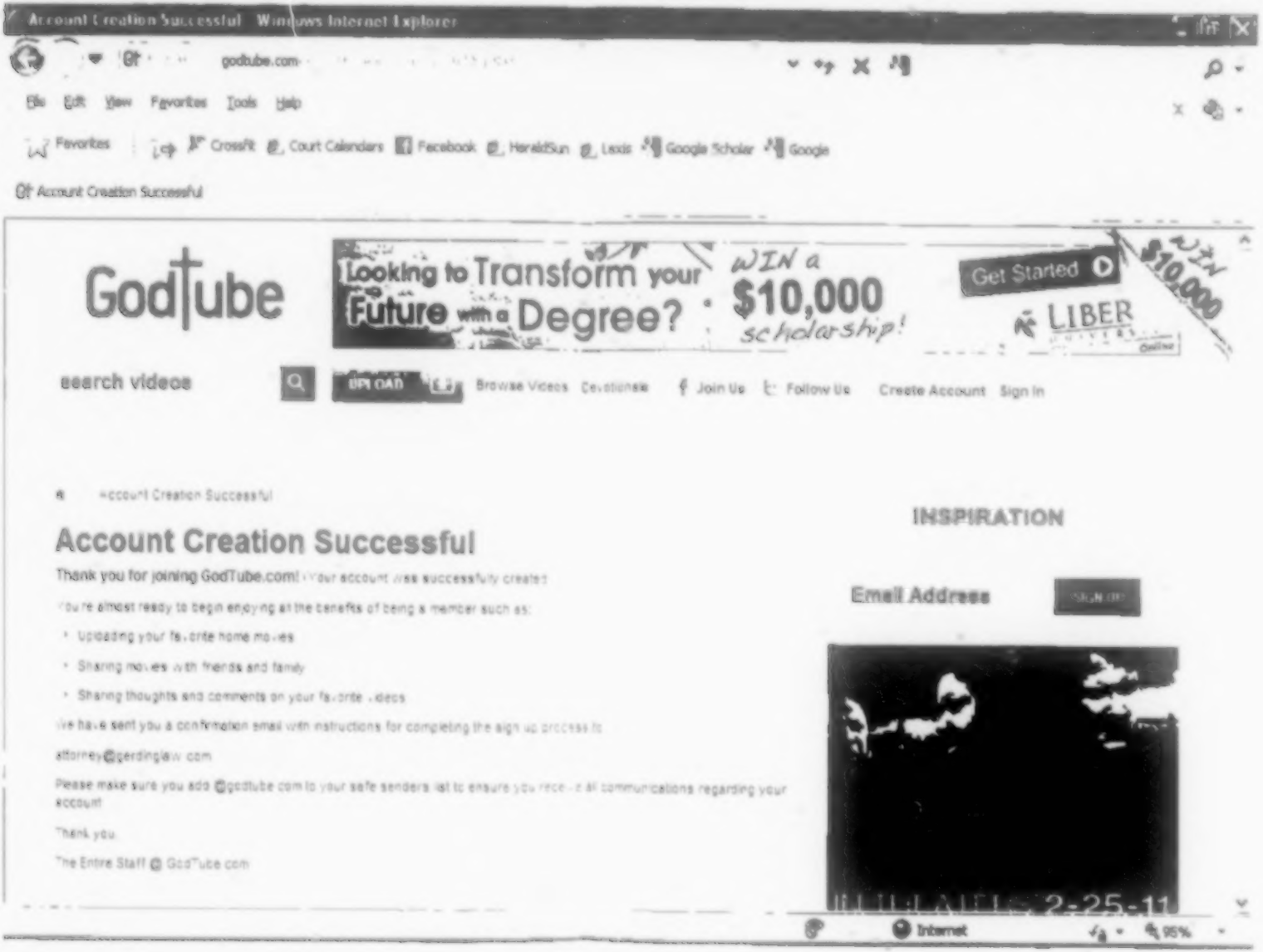


www.bettycrocker.com Community section – Message Board – Open Forum, usernames

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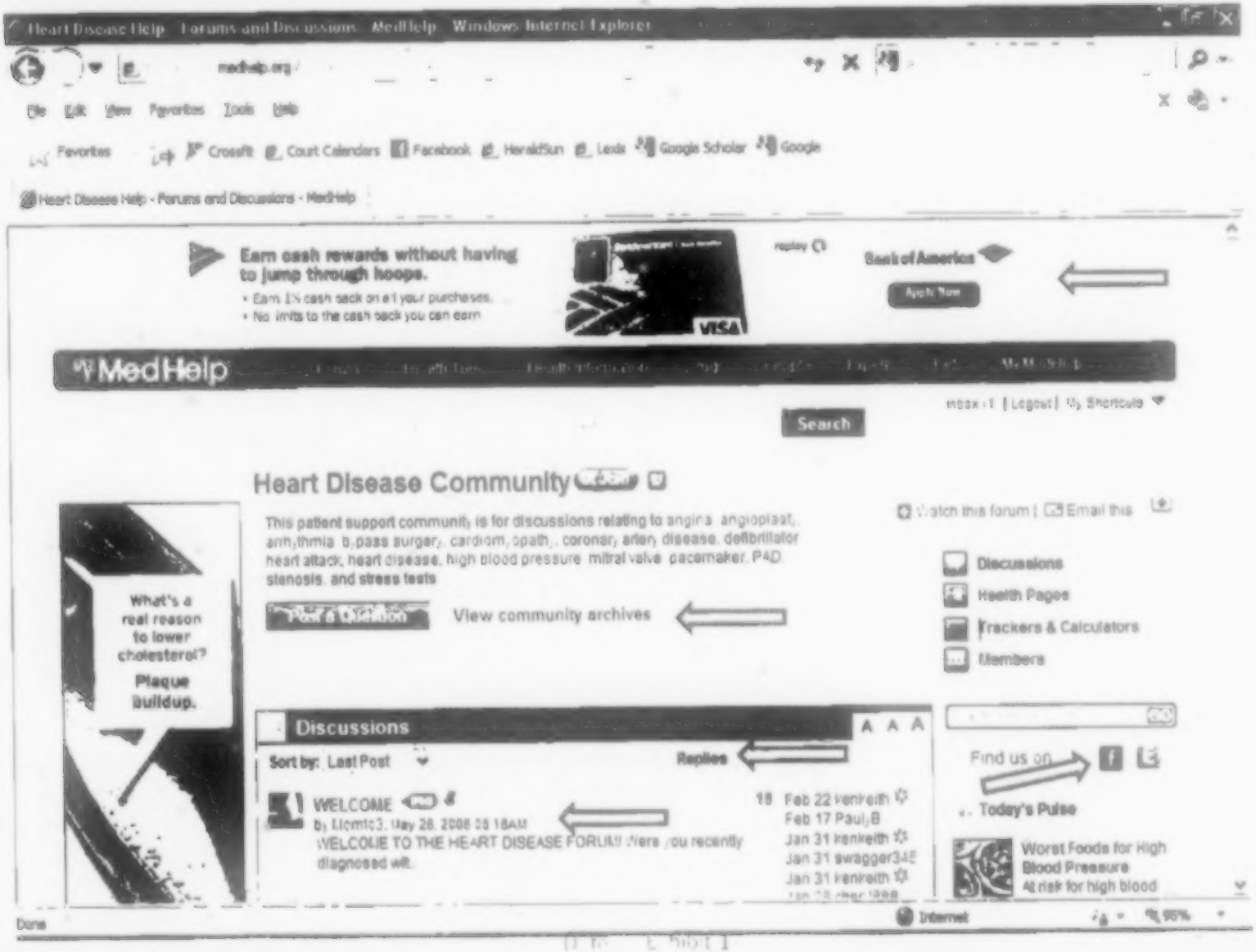
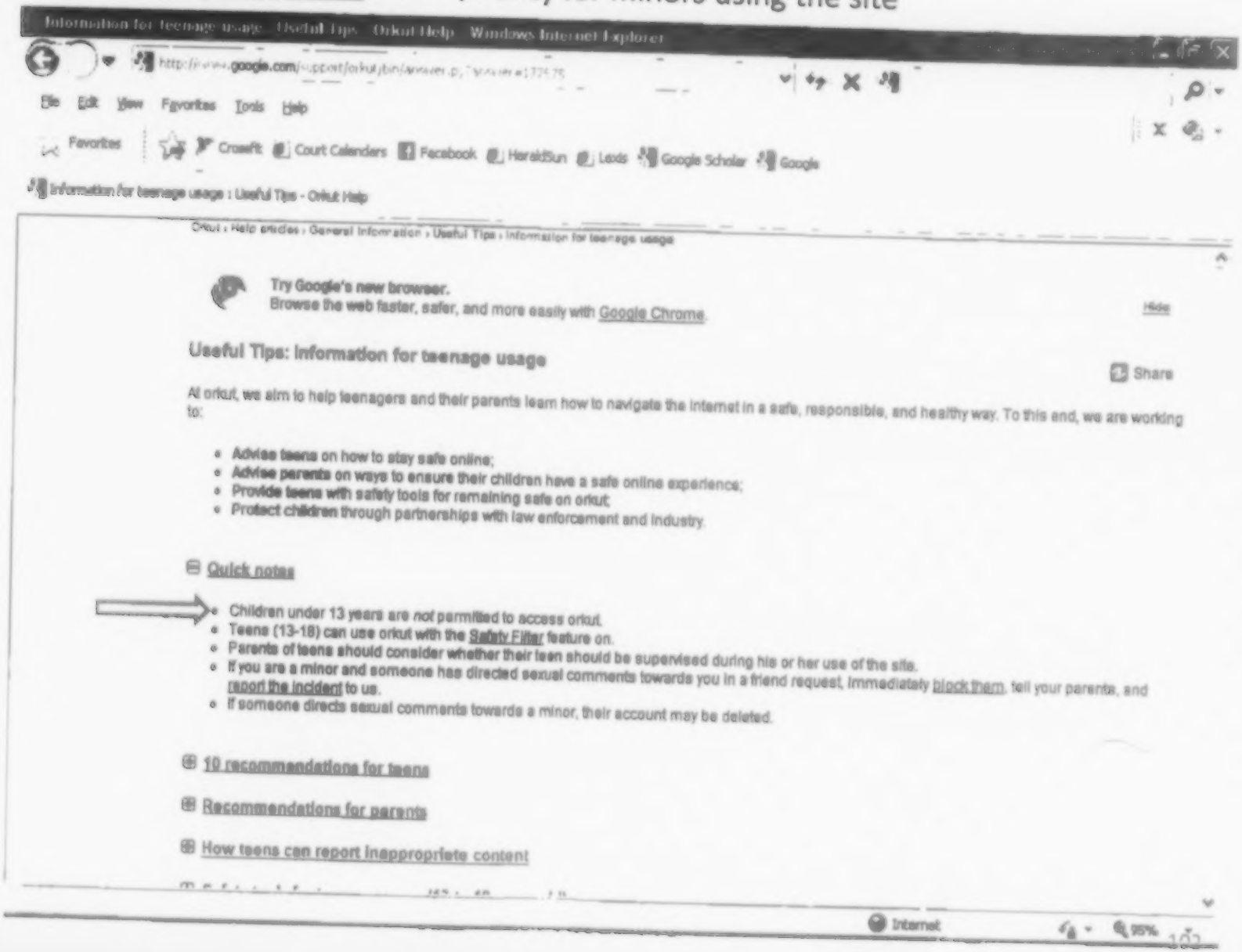




Information for teenage usage : Useful Tips - Orkut Help

Orkut › Help articles › General Information › Useful Tips › Information for teenage usage

Try Google's new browser.
Browse the web faster, safer, and more easily with Google Chrome.

Hide

Useful Tips: Information for teenage usage

Share

At orkut, we aim to help teenagers and their parents learn how to navigate the Internet in a safe, responsible, and healthy way. To this end, we are working to:

- Advise teens on how to stay safe online;
- Advise parents on ways to ensure their children have a safe online experience;
- Provide teens with safety tools for remaining safe on orkut;
- Protect children through partnerships with law enforcement and industry.

Quick notes

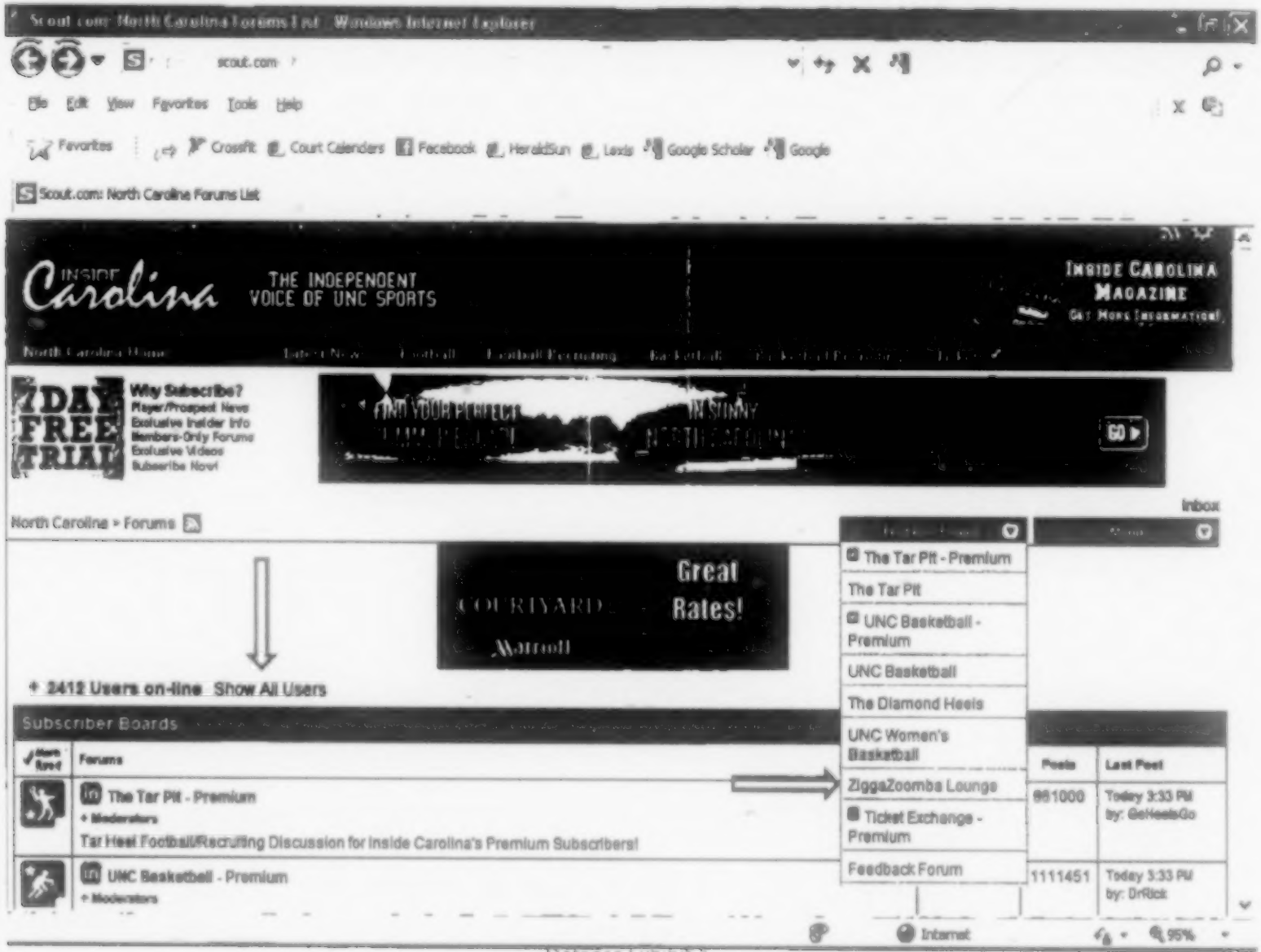
- Children under 13 years are *not* permitted to access orkut.
- Teens (13-18) can use orkut with the Safety Filter feature on.
- Parents of teens should consider whether their teen should be supervised during his or her use of the site.
- If you are a minor and someone has directed sexual comments towards you in a friend request, immediately block them, tell your parents, and report the incident to us.
- If someone directs sexual comments towards a minor, their account may be deleted.

10 recommendations for teens

Recommendations for parents

How teens can report inappropriate content

www.scout.com Forums, Advertisements, Lounge, view user profiles



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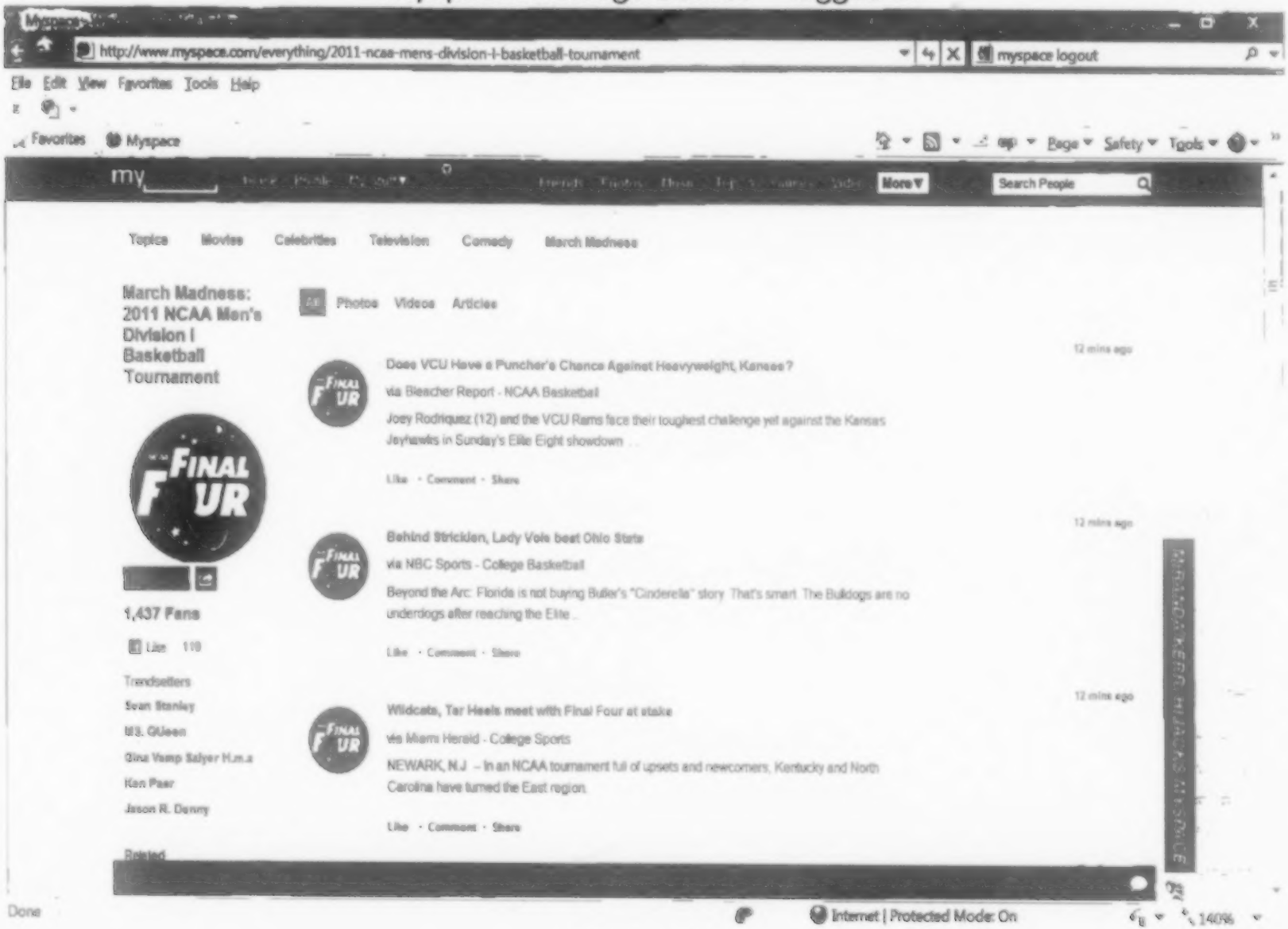
http://www.facebook.com/pages/Bev-Perdue/11552180685 Bev Perdue – logged in

http://www.facebook.com/LDS Mormon Church Facebook page – not logged in

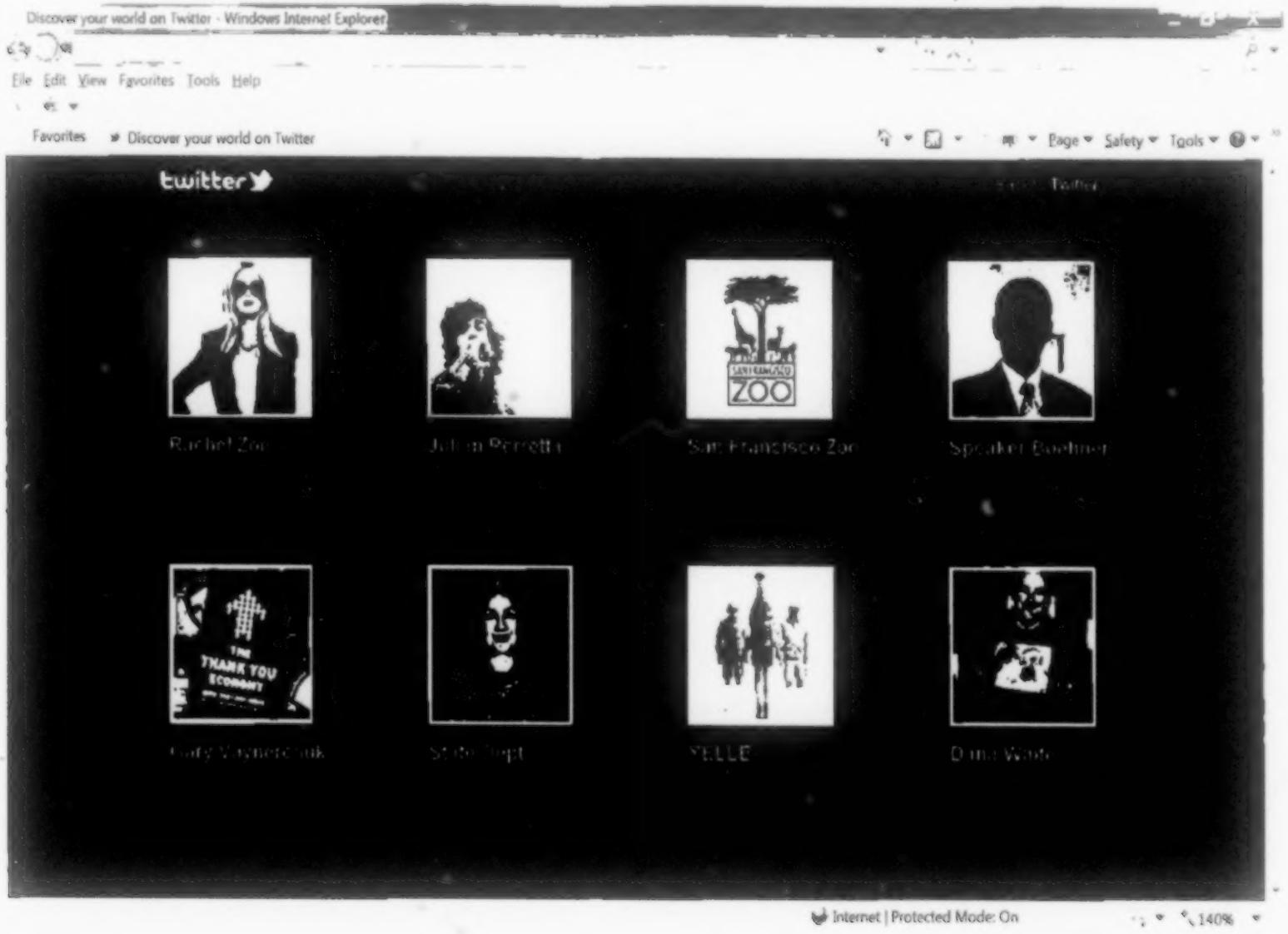
http://www.myspace.com/everything/2011-ncaa-mens-division-i-basketball-tournament

MySpace Message Boards – logged in



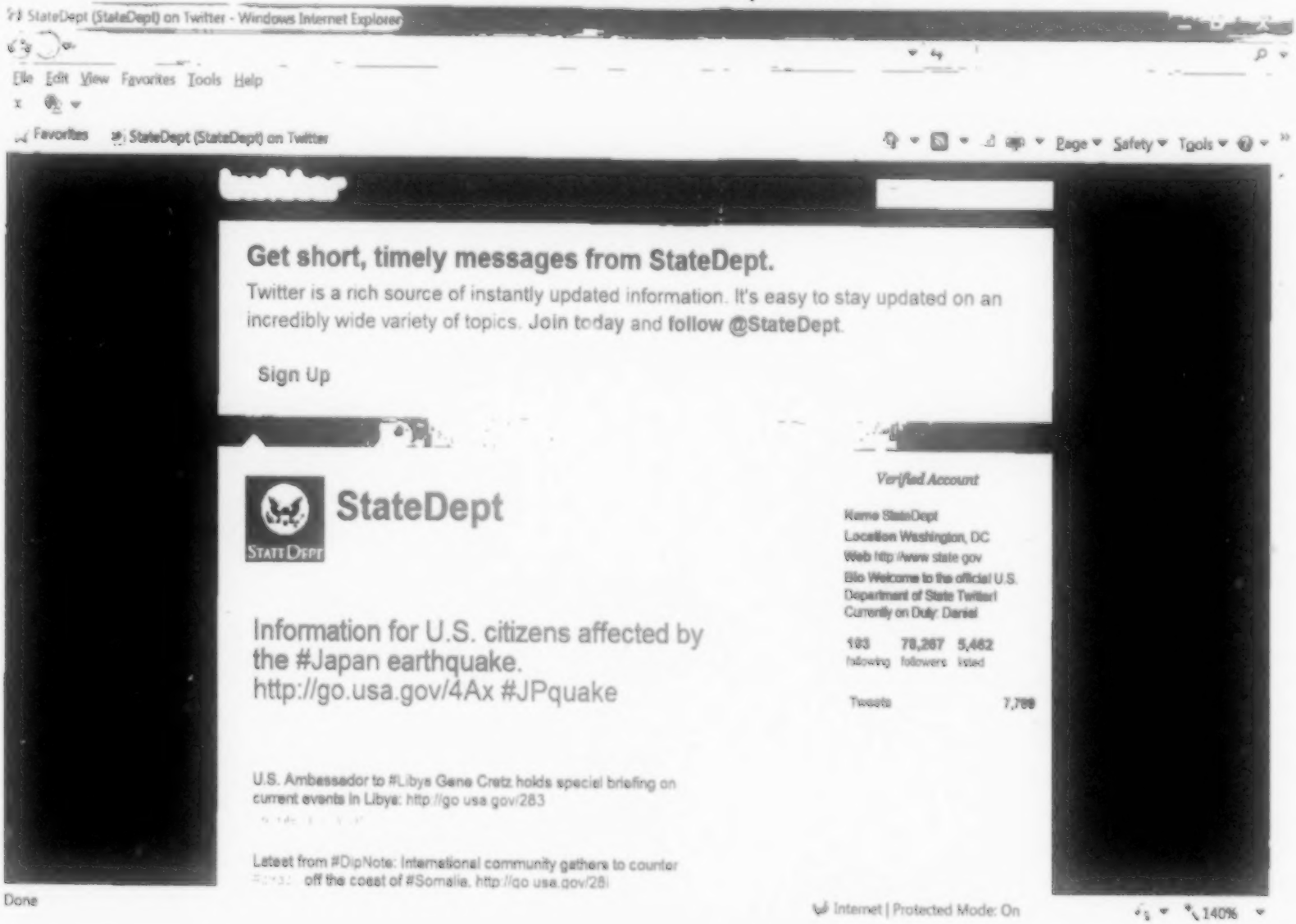
http://discover.twitter.com/?autoplay=true

Twitter – People to Follow – Includes US State Department

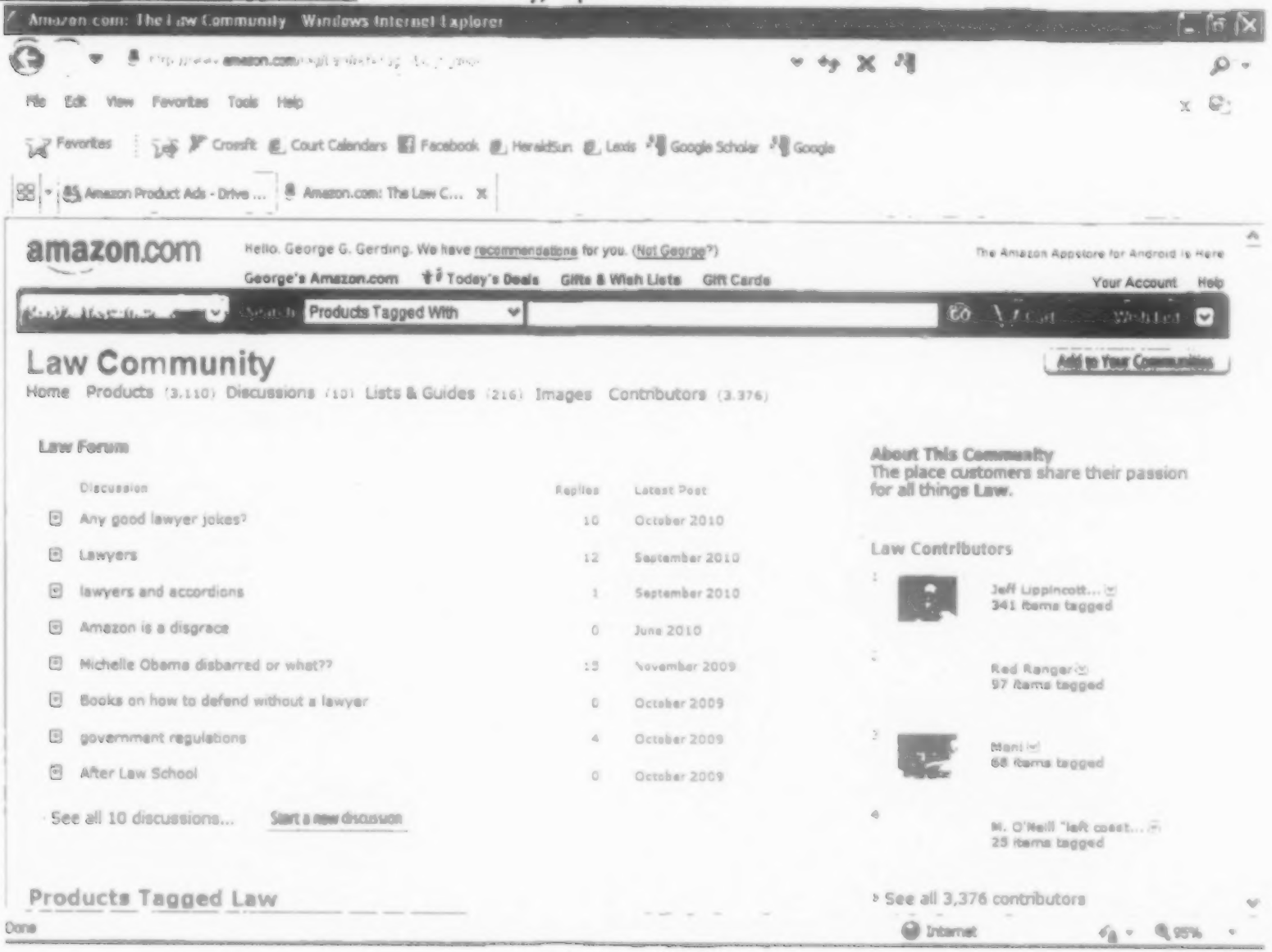


http://twitter.com/StateDept#

Twitter – US State Department

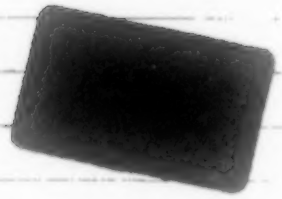


http://www.amazon.com/ Community, open forum



Search

Send J.R. a Message



J.r. Gerrard Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent.....Praise be to GOD, WOW! Thanks JESUS!

April 27 at 9:04am

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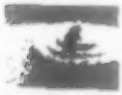

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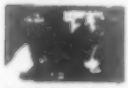

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NORTH CAROLINA
DURHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
10 CRS 57148

STATE OF NORTH CAROLINA

v

LESTER PACKINGHAM
DEFENDANT

STIPULATION [#1] BY PARTIES FOR TRIAL

The parties in the above captioned matters do hereby agree and stipulate to the following:

Lester Packingham was a convicted sexual offender subject to the North Carolina Registry requirements for Sexual Offenders, on and about May 22, 2010. He had previously been convicted of a sexual offense on September 16, 2002, involving a victim child of 13 years of age, in Carrabus County, NC, file #02CRS8475.

This the *29th* day of *May*, 2012:

s/Lester Packingham
Defendant Lester Packingham

s/Theresa K. Pressley
A.D.A. Theresa K. Pressley

s/Lynn Norton-Ramirez
Attorney Lynn Norton-Ramirez

NORTH CAROLINA
DURHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
10 CRS 57148

STATE OF NORTH CAROLINA

v

LESTER PACKINGHAM
DEFENDANT

STIPULATION [#2] BY PARTIES FOR TRIAL

The parties in the above captioned matters do hereby agree and stipulate to the following:

Lester Packingham was a convicted sexual offender subject to the North Carolina Registry requirements for Sexual Offenders, on and about May 22, 2010, and had acknowledged his obligations on February 9, 2009 as attached.

This the *29th* day of *May*, 2012:

s/Lester Packingham
Defendant Lester Packingham

s/Theresa K. Pressley
A.D.A. Theresa K. Pressley

s/Lynn Norton-Ramirez
Attorney Lynn Norton-Ramirez

SEE BOTH SIDES

IMPORTANT NOTICE

CHANGES TO NORTH CAROLINA SEX OFFENDER REGISTRATION LAWS

ALL REGISTERED OFFENDERS MUST COMPLY

Major changes to North Carolina's Sex Offender and Public Protection Registration Programs were signed into law this summer, and will take effect soon. As a registered offender, you are receiving this notice because session laws 2008-117, 2008-218, and 2008-220 directly affect you. Failure to comply with these new regulations could result in criminal penalties. This notice gives a brief summary of the changes. It is your responsibility to make sure you understand all the laws affecting registered offenders and to comply with the law. Please pay special attention to the items listed below.

FOR FURTHER INFORMATION

- For complete details on all law changes, or if you have questions about this notice, please contact your county sheriff's office.
- You may access the full text of the statutes governing the North Carolina's Sex Offender and Public Protection Registration Programs, including the recent session laws, via the General Assembly's website: www.ncleg.net

LAW CHANGES IMPACTING YOU

1. **IN PERSON REPORTING PERIOD SHORTENED TO THREE (3) BUSINESS DAYS:** Effective December 1, 2008, a person who is

required to register will have three (3) business days to **report IN PERSON to the Sheriff's office** to;

a. Register after establishing residency or being released from a penal institution;
b. Verify information after receipt of a verification form;
c. Provide written notification of any change of address;
d. Provide written notification of any intent to move out-of-state (and, if such person does not leave the state, they must notify the sheriff in person within 3 days after date they originally indicated they would leave the state);
e. Provide written notification of any change in academic status;
f. Provide written notice of any change in employment status at an institution of higher education.

2. **PROHIBITED FROM COMMERCIAL SOCIAL NETWORKING WEB SITES:** Effective December 1, 2008, it will be unlawful for a registered offender to access a commercial social networking Web site that permits minor children to become members or create or maintain personal Web pages. "Commercial social networking Web sites" 1) facilitate social introduction between persons; 2) allow persons to communicate with others through such mechanisms as a message board, chat room, electronic mail, instant messenger, etc.; 3) allow users to create Web pages or personal profiles; and 4) derive revenue from fees, advertising, or other sources related to the operation of the Web site.

3. **PROHIBITED FROM CHANGING NAME:** Effective December 1, 2008, it will be unlawful for a

registered offender to obtain a name change under Chapter 101 of the North Carolina General Statutes.

Lester Packingham 2/9/09 L.P.
[Signature]

4. **PROHIBITED FROM CERTAIN LOCATIONS:** Effective December 1, 2008, persons required to register who have committed any offense in Article 7A of Chapter 14 of the North Carolina General Statutes or any offense in which the victim of the offense was under the age of 16 years at the time of offense are prohibited from the following locations:
   a. **On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.**
   b. **Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in the previous paragraph (paragraph 4. a.) that are located in malls, shopping centers,** or other **property open to the general public.**
   c. **At any place where minors gather for regularly scheduled educational, recreational, or social programs.**

Exceptions: A parent or guardian of a minor may take the minor to any location that can provide emergency medical care treatment if the minor is in need of emergency medical care.

A parent or guardian of a student enrolled in a school may wish to consult the statutes, the school board, and/or the Sheriff's Office to see if they qualify for a limited exception to go to their child's school. Provided they comply with all statutory requirements, parents or guardians may be able go to their child's school to attend a conference with school personnel to discuss their child's academic or social progress or when requested by the principal. If a parent or guardian qualifies under this limited exception, they must comply with the statutory notification requirements including that they notify the principal of the school of their registration on the North Carolina Sex Offender and Public Protection Registry and of their arrival to and departure from the school. The parent or guardian must be under the direct supervision of school personnel at all times they are on school property.

There is an exception for persons eligible to vote at a prohibited location used as a voting place as defined by N.C.G.S. § 163-165. Such persons shall be on the premises only for the purposes of voting and shall not be outside the voting enclosure other than for the purpose of entering and exiting the voting place. If the voting place is a school, then they shall notify the principal of the school that they are a registered offender.

There is an exception for persons eligible under N.C.G.S. § 115C-378 to attend public school to be present on school property if permitted by the local board of education.

There is an exception for juveniles to be present at a location to receive medical treatment or mental health services if they remain under the direct

supervision of an employee of the treating institution at all times.

5. **ONLINE INDENTIFIERS:** Effective May 1, 2009, a person required to register must provide the Sheriff with any online identifier that the person uses or intends to use. An "online identifier" means electronic mail address, instant message screen name, user ID, chat or other Internet communication name, but does not mean social security number, date of birth, or pin number. If a person required to register changes an online identifier, or obtains a new online identifier, the person, shall within 10 days, report **in person** and provide the information to the Sheriff. Persons registered prior to May 1, 2009 may provide this information in person at the first verification of information that occurs on or after May 1, 2009.

Lester Packingham 2/9/09 L.P.
[Signature] 2/9/09

COUNTY OF DURHAM
OFFICE OF THE SHERIFF
WORTH L. HILL
SHERIFF

[SEAL] [SEAL]

The North Carolina General Statutes details certain restrictions on were sex offenders may live:

NCGS § 14-208.16. Residential restrictions.

(a) A registrant under this Article shall not knowingly reside within 1000 feet of the property on which any public or non public school or child care center is located . . .

(b) A violation of this section is a Class G Felony. (2006-247, s. 11(a).)

It has been determined that your residence, located at

311 S. LaSalle St Apt 42E

Is located within 1000 feet of the following school(s) or daycare(s):

Precious Moment Home Care

You will have **30 Days** form [sic] this date to obtain appropriate housing which complies with the requirements of NCGS 14-208.16. If you fail to comply with NCGS 14-208.16, you will be subject to arrest and prosecution. This Office has information on schools and licensed day cares and can advise you whether any particular address is similarly prohibited. Please note however that this information is drawn form [sic] other public databases and we cannot guarantee its accuracy.

I have received a copy of this notification and understand I must comply within 30 Days which will expire on *March 11, 2009*

Signature *Lester Packingham* Date *2/9/09*

Witnessed by Deputy/ Office Staff Assist. *Lt. G[illegible]* Date *2/09/09*

Deputy Signature /Office Staff Assist _____

Durham County Judicial Bldg., 1st Floor, P.O. Box 170, 201 E. Main Street, Durham, NC 27701 (919) 560-0900

Equal Employment/Affirmative Action Employer

FILED
DEC 15 2016
OFFICE OF THE CLERK

No. 15-1194

IN THE

Supreme Court of the United States

LESTER GERARD PACKINGHAM,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari
to the Supreme Court of North Carolina

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The North Carolina Supreme Court sustained petitioner's conviction under a criminal law, N.C. Gen. Stat. § 14-202.5, that makes it a felony for any person on the State's registry of former sex offenders to "access" a wide array of websites—including Facebook, YouTube, and nytimes.com—that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts. The law—which applies to thousands of people who, like petitioner, have completed all criminal justice supervision—does not require the State to prove that the accused had contact with (or gathered information about) a minor, or intended to do so, or accessed a website for any illicit or improper purpose.

The question presented is: Whether, under this Court's First Amendment precedents, such a law is permissible, both on its face and as applied to petitioner—who was convicted based on a Facebook post in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

PARTIES TO THE PROCEEDING

Petitioner is Lester Gerard Packingham, Jr.[†] Respondent is the State of North Carolina.

Christian Martin Johnson is not a party to this case, though he and petitioner were co-movants in the Superior Court Motion to Dismiss Hearing. *See* Pet. App. 54a.

[†] In the proceedings below, the suffix "Jr." was incorrectly omitted from petitioner's name. Petitioner goes by the name "J.R."

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BRIEF FOR PETITIONER

Petitioner Lester Gerard Packingham, Jr. respectfully requests that this Court reverse the judgment of the Supreme Court of North Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina, Pet. App. 1a, is reported at 777 S.E.2d 738. The opinion of the Court of Appeals, Pet. App. 36a, is reported at 748 S.E.2d 146. The order of the Superior Court denying the motion to dismiss, Pet. App. 54a, is unreported.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on November 6, 2015. The petition for a writ of certiorari was filed on March 21, 2016, and granted on October 28, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech."

North Carolina General Statutes Chapter 14, Section 202.5 provides in pertinent part:

> (a) Offense.—It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become

members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

* * * *

(e) Punishment.—A violation of this section is a Class I felony.

STATEMENT OF THE CASE

In April 2010, petitioner J.R. Packingham shared the following post on Facebook after a traffic ticket was dismissed:

> Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court costs, no nothing spent.....Praise be to GOD, WOW! Thanks JESUS!

J.A. 136 (ellipsis in original). Soon after, he was arrested and convicted for violating North Carolina General Statutes Chapter 14, Section 202.5.

1. Section 202.5 makes it a felony for a person on North Carolina's Sex Offender and Public Protection Registry to "access" any "commercial social networking Web site" that he "knows" does not restrict membership to adults. N.C. Gen. Stat. § 14-202.5(a).

a. Social networking websites are diverse and varied. But generally speaking, they enable large numbers of users to connect with one another, to form groups along common interests, and to share "information, opinions, and other content." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1356 (D.C. Cir. 2014). These websites allow users to mutually agree to connect as "friends" (Facebook, Snapchat, Myspace), "followers" (Twitter, Instagram, Pinterest), "subscribers" (YouTube), and "connections" (LinkedIn).

b. These sites continue to grow in relevance, functionality, and popularity. For example, 62% of American adults get news from such sites. Jeffrey Gottfried & Elisa Shearer, Pew Res. Ctr., *News Use Across Social Media Platforms 2016* (May 26, 2016), http://pewrsr.ch/27TOfhz. Every day, more than half of American adults log onto that site. Shannon Greenwood et al., Pew Res. Ctr., *Social Media Update 2016* (Nov. 11, 2016), http://pewrsr.ch/2fIeTTY. And more than 90% of Facebook's U.S. users are adults. Statista, *Distribution of Facebook Users in the United States* (Jan. 2016), http://bit.ly/2hgnPnE. These sites are aggressively adding features and services, such as instant messaging, live broadcasting, virtual marketplaces, emergency notifications, and specialized platforms for political candidates and government officials. *See, e.g.*, Ryan Holmes, *5 Big Changes Coming to Social Media in 2016*, Observer (Jan. 20, 2016), http://bit.ly/1OGVRrI; *Elections*, Facebook, https://politics.fb.com.

Billions of people worldwide now use these sites. YouTube alone has more than one billion monthly active users. Facebook, which had approximately 100

million users when Section 202.5 was enacted in 2008, had grown to 1.59 billion users when the petition for certiorari was filed. Statista, *Numbers of Monthly Active Facebook Users Worldwide As of 3rd Quarter 2016* (2016), http://bit.ly/2daz7Yr. While the petition was pending, almost 200 million more users joined the site. *Id.*

c. On every site, users can determine what information is shared and with whom. On Facebook, for example, users are able to designate which information may be viewed by family, "friends," friends of friends, all Facebook users, or the public at large. Minors, however, have long been subject to significantly more restrictive rules regarding what content they can share with other users. Facebook—which prohibits those under thirteen from creating accounts—implements default settings that segment users by age: Adults cannot see the profile information of minors who are outside their network. *See* Berkman Ctr. for Internet & Soc'y, *Enhancing Child Safety and Online Technologies: Final Report of the Internet Safety Technical Task Force to the Multi-State Working Group on Social Networking of State Attorneys General of the United States* app. E, Facebook Submission 2-3 (2008) ["*Enhancing Child Safety*"].

More stringent restrictions are imposed on users between the ages of thirteen and sixteen. *See, e.g.*, *Enhancing Child Safety* app. E, Viacom Submission 1-2 (Viacom, which operates numerous sites, prohibits users under sixteen from making their profiles "public" to adult users.). These sites have also developed sophisticated automated systems that operate continuously to detect "anomalous behavior"

and "unusual patterns"—for instance, "users whose friend requests are ignored at a high rate" or "adult users who are contacting an inordinate number of minors." *Id.*, Facebook Submission 2.

2. The General Assembly enacted Section 202.5 in 2008 as part of a concerted effort to make North Carolina "one of the toughest states, if not the toughest" in its treatment of those on the State's registry. Whitney Woodward, *NC Senate, House Approve "Jessica's Law,"* Associated Press (July 17, 2008).

a. An initial version of Section 202.5 would have increased existing penalties for exploiting a minor or soliciting a minor "by computer"—criminal laws that apply to registrants and nonregistrants alike. *See* S.B. 132–2d ed., 2007 Gen. Assemb., Reg. Sess. §§ 2-4, 6 (N.C. 2007). That draft also would have imposed obligations on website operators to ensure that minors obtain adult permission before establishing accounts and to afford parents access to their child's page "at all times." *See id.* § 8. But the General Assembly abandoned these proposals in favor of one imposing punishment on registrants. That measure was unanimously approved by both houses. *Senate Bill 132: Protect Children from Sexual Predators Act*, N.C. Gen. Assemb. (July 18, 2008), http://bit.ly/2hgvhis.

b. Section 202.5 applies to the approximately 20,000 individuals on North Carolina's registry. *See* N.C. Gen. Stat. § 14-202.5(a); *Offender Statistics*, N.C. Dep't Pub. Safety, http://sexoffender.ncsbi.gov/stats.aspx. When initially enacted, North Carolina's registration law focused on providing law enforcement and the public with up-to-date,

searchable identification and residency information about residents previously convicted of certain sexual and other offenses. *See* N.C. Dep't of Justice, Law Enf't Liaison Section, *The North Carolina Sex Offender & Public Protection Registration Programs* 1 (Sept. 2014) ["*Registry Overview*"].

Today, North Carolina uses the registry for purposes beyond providing information. It has enacted multiple restrictions—backed by criminal punishment—that deprive registrants of the ability "to move where they wish and to live and work as other citizens," *Smith v. Doe*, 538 U.S. 84, 101 (2003). *See Registry Overview*, *supra*, at 11-17; *see, e.g.*, N.C. Gen. Stat. § 14-208.18. *But see Does v. Cooper*, No. 16-6026, 2016 WL 6994223, at *9 (4th Cir. Nov. 30, 2016) (holding prior version of premises restriction unconstitutional).

Section 202.5 applies not only to individuals determined to "suffer from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses," N.C. Gen. Stat. § 14-208.6(6) ("sexually violent predator"),[1] but also to registrants whose reporting obligations derive from convictions for nonsexual offenses and offenses not involving minors, *see id.* § 14-208.6(1m), (5). It also extends to individuals convicted in another state for any offense that would require registration in that state. *See id.* § 14-208.6(4)(b). The criminal

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[1] This designation triggers a lifetime registration requirement and continuous satellite-based monitoring. N.C. Gen. Stat. § 14-208.40 et seq. Petitioner does not fall in this category, and it has never been claimed that he could.

prohibition applies for the entire duration of the registration requirement—thirty years or life, depending on the reportable offense. *Id.* §§ 14-208.6A, 208.23.

Although there is considerable dispute about the reach of the statute's "commercial social networking Web site" definition, *see infra* 45-46, the State has prosecuted over 1,000 cases under Section 202.5. *See* John H. Tucker, *Durham Man Challenges Law on Sex Offenders and Social Networking Sites*, Indyweek (May 29, 2013), http://bit.ly/2hb0cNj (reporting 1,136 charges under Section 202.5 between 2009 and 2012). Registrants have been charged for accessing Facebook, YouTube, Google+, Instagram, MySpace, and Skype.[2]

3. At the time petitioner posted on Facebook in 2010, he was not incarcerated, on probation, or on post-release supervision. His reportable offense was a 2002 conviction, when he was a 21-year-old college student, on a single count of taking indecent liberties with a minor. *See* Judgment, *State v. Packingham*, No. 02CRS-008475 (N.C. Super. Ct., Cabarrus Cty. Sept. 16, 2002) ["*2002 Judgment*"].

The court in that case had imposed the lowest allowable sentence, ten- to twelve-months, which it

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[2] *See, e.g.*, *Crime Briefs: Websites*, News Rep., Feb. 1, 2016, at 4A (YouTube and Google+); *Burlington Sex Offender Charged with Using Social Networking Website*, Times-News (Nov. 17, 2015), http://bit.ly/2gdBrzB (Instagram); Pet. App. 55a (petitioner's co-movant indicted for accessing MySpace); Indictment, *State v. Davis*, No. 11CRS-053996 (N.C. Super. Ct., Halifax Cty. Jan. 9, 2012) (Skype).

then suspended, imposing twenty-four months' supervised probation. *2002 Judgment.* During the probationary period, petitioner was subject to mandatory conditions requiring that he register, submit to warrantless searches—including of his "computer or other electronic [devices]," N.C. Gen. Stat. § 15A-1343(b2)(9), refrain from illegal substance use, and avoid contact with the victim. *2002 Judgment.* The sentencing court chose to impose no additional conditions. *Id.*; *see* N.C. Gen. Stat. § 15A-1343(b2)(6) (authorizing further conditions as needed). Petitioner's period of supervised probation expired four years before the General Assembly enacted Section 202.5.

4. In April 2010, Durham Police Corporal Brian Schnee logged into his personal Facebook account to see if any registrants happened to be on that website. J.A. 11-12. He had heard reports of an arrest in another county under Section 202.5, which had "piqued [his] curiosity." *Id.* 11. During his search, Corporal Schnee came across petitioner's Facebook post. *Id.* 63-64. He obtained via warrant extensive records from Facebook. *Id.* 64-66. He then arrested petitioner and executed a warrant to search petitioner's home, seizing his computer, thumb drives, and Polaroid camera. *Id.* 66; Trial Tr. 161. Petitioner was indicted for violating Section 202.5.

5. a. Petitioner moved to dismiss the indictment on the ground that Section 202.5 violates the First Amendment.[3] During the hearing on that motion, the

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[3] The motion to dismiss was heard and decided jointly with one filed by Christian Martin Johnson, who had been arrested

court admitted into evidence exhibits showing that Section 202.5 proscribes access to numerous websites, including Facebook, Twitter, MySpace, bettycrocker.com, Godtube.com, medhelp.org, orkut, scout.com, and Amazon. J.A. 123-35.

At the hearing, defense counsel examined Corporal Schnee as to his understanding of the statute. He testified that he was not sure which sites Section 202.5 covered. J.A. 77-78. Indeed, if asked by "folks out on the street" who want to access a website but are concerned that it might be prohibited, he would recommend, "don't do it." *Id.* 78. "The best way for . . . somebody not to get in trouble is to not do something." *Id.*

The trial court denied the motion to dismiss, emphasizing that it was the legislature's responsibility to weigh "disparate interests and to forge a workable compromise." Pet. App. 60a (quoting *State v. Bryant*, 614 S.E.2d 479, 486 (N.C. 2005)). The court concluded that the "balance" Section 202.5 strikes, between "activities of sex offenders" and "protection of minors," was constitutionally permissible. *Id.* 64a.

Petitioner stood trial. The State never alleged that petitioner engaged in illicit activity on Facebook or any other website. The only evidence of "access"

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by Corporal Schnee for accessing MySpace and whose case was pending before the same judge. Pet. App. 55a. Johnson testified at the Motions Hearing that he lost his job as an information technology contractor because his work required him to use websites that Section 202.5 forbade him from accessing. J.A. 117-20. The charges against Johnson were eventually dismissed.

presented was a print-out of the one "God is Good!" post. *See* J.A. 136. During the State's closing argument, the prosecutor told jurors:

> [Y]ou may not like the law, because the law could [have] sa[id], defendant having been convicted [a] sexual offender . . . cannot have specific contact on Facebook with minor children, or it could [have] sa[id] that the access to Facebook can't say specific things that might entrap, and it doesn't. It doesn't. . . . [E]ven if you don't agree with it, even if you don't like it, . . . the law says he cannot access a social networking site.

Trial Tr. 253-54. The jury convicted petitioner of criminal "access." He received a prison sentence, which the court suspended. *Id.* 289.

b. The North Carolina Court of Appeals overturned petitioner's conviction, unanimously holding that Section 202.5 violates the First Amendment, both on its face and as applied.

The court of appeals highlighted the similarities between Section 202.5 and other states' "social media bans," which various federal courts had held unconstitutional. *See* Pet. App. 43a-46a (citing *Doe v. Prosecutor*, 705 F.3d 694, 699 (7th Cir. 2013); *Doe v. Jindal*, 853 F. Supp. 2d 596, 607 (M.D. La. 2012); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1112 (D. Neb. 2012)). Like those laws, the court of appeals explained, Section 202.5 has an undeniably legitimate purpose—protecting minors from sexual abuse—and does not suppress expression based on its subject or viewpoint. *See id.* 42a. But also like those laws, the court held, Section 202.5 impermissibly

"prohibit[s] an enormous amount of expressive activity on the internet," *id.* 46a, including much that is "unrelated to online communication with minors," *id.* 51a (explaining Section 202.5 "could be interpreted to ban registered sex offenders from . . . conducting a 'Google' search, [or] purchasing items on Amazon.com").

c. The State sought review in the North Carolina Supreme Court, pointing to a feature of Section 202.5 it claimed the appellate court overlooked. *See* Pet. Discretionary Review 10-11 (No. BL-4). While other states' laws sought to prevent registrants from using social networking sites on the "theory that actual speech" with minors for improper purposes was the danger, North Carolina's measure aimed to prevent "information *gathering*," which could enable malefactors to target young people for criminal purposes. *Id.*

The State Supreme Court, over vigorous dissent, reversed, thereby reinstating petitioner's conviction. It held Section 202.5 to be "constitutional in all respects." Pet. App. 2a. The court first concluded that the law should be analyzed as a "limitation on conduct" rather than a speech restriction, because it prohibits registrants from "accessing" proscribed websites. *Id.* 9a. Accordingly, the court pronounced the burdens on their ability "to engage in speech on the Internet" to be "incidental." *Id.* 12a. The court then accepted the State's asserted interest in "prevent[ing] registered sex offenders" from "harvest[ing] information" as "unrelated to the suppression of free speech." *Id.* 13a-14a.

Citing the First Amendment test applicable to content-neutral time, place, or manner regulations,

Ward v. Rock Against Racism, 491 U.S. 781 (1989), the North Carolina Supreme Court pronounced Section 202.5 "sufficiently narrowly drawn," Pet. App. 16a, because it is "not substantially broader than necessary to achieve the government's interest," *id.* 15a (quoting *Ward*, 491 U.S. at 800). Although the law "could have been drafted even more narrowly," the court emphasized, it fell short of "imposing a blanket prohibition against Internet use." *Id.* 15a-16a. While "numerous well-known Web sites" may be foreclosed, *id.* 16a, the court continued, Section 202.5 "leaves open ample alternative[s]," *id.* 19a. For example, though registrants' accessing nytimes.com could give rise to prosecution, they "may [still] follow current events on WRAL.com," the local NBC affiliate's website. *Id.* 17a. For similar reasons, the statute did not fail as overbroad: Registrants "are prohibited from accessing only those Web sites where they could actually gather information about minors to target," but are otherwise "free to use the Internet." *Id.* 25a.

Justices Hudson and Beasley dissented, concluding that Section 202.5 is unconstitutional both on its face and as applied to convict petitioner. Invoking "basic principles of freedom of speech," Pet. App. 29a (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011)), the dissent explained that Section 202.5 "regulates First Amendment-protected activity" directly—not incidentally, *id.* And it does so with "alarming breadth," *id.* 34a (quoting *United States v. Stevens*, 559 U.S. 460, 474 (2010)), by "completely barr[ing]" a class of citizens "from communicating with others through many widely utilized commercial networking sites," *id.* 28a,

including "Facebook, Google+, LinkedIn, Instagram, Reddit, MySpace," and many sites not "normally thought of as 'social networking' sites" as well, such as FoodNetwork.com, nytimes.com, and "North Carolina's own News & Observer," *id.* 33a. Whether or not Section 202.5 warranted strict First Amendment scrutiny was of no moment. Because North Carolina's law burdens so much "more speech than necessary," *id.* 34a (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2537 (2014)), it "c[ould] not survive" review even under less demanding standards, *id.*

SUMMARY OF ARGUMENT

The law North Carolina enforced against petitioner is an unusually "stark example of speech suppression." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). Section 202.5 imposes criminal punishment for activity fully protected under the First Amendment. The statute requires no proof that by accessing a website, the person caused or intended any harm. Rather, the law imposes punishment because access *could* facilitate harm if undertaken by someone with a criminal purpose.

I. Almost everything that happens on social networking websites is protected First Amendment activity. In fact, today, many Americans exercise their rights to express themselves, associate, and learn important information more on these sites than anywhere else.

Yet the North Carolina Supreme Court held that Section 202.5's burdens on Free Speech were merely incidental because punishment attaches to the "conduct" of accessing these websites. That is a non-

starter. As the Court has recognized, the safeguards of the First Amendment may not be evaded by regulating some *non*-speech attribute of protected activity. A law that prohibits the "act" of reading a newspaper—or gathering information from it—is a direct regulation of speech. Indeed, for all of the State's emphasis on the distinct issue of "gathering information," it never alleged that petitioner gathered any, let alone did so for improper purposes.

That Section 202.5 imposes its burdens on a subset of the State's populace—one defined by registry status is a First Amendment vice, not a virtue. It is hard to imagine that a government would impose, or a court would uphold, a similarly sweeping, criminal ban directed at any other group of people. And the First Amendment does not tolerate a different rule based on the fact of prior conviction. This Court recently held that declaring "Thank God for Dead Soldiers" outside a servicemember's funeral is entitled to full First Amendment protection. *Snyder v. Phelps*, 562 U.S. 443, 448, 460-61 (2011). Petitioner's right to affirm that "God is Good!" to his family and friends is no less worth protecting, his 2002 guilty plea notwithstanding.

II. Section 202.5 violates foundational First Amendment principles. The earliest cases enforcing the First Amendment rejected the notion that government may punish speech that causes no harm and was not meant to cause harm if doing so would reduce the likelihood that crime will occur. And the Constitution forbids punishing First Amendment activity that is void of criminality in itself on the theory that [redacted] right exercised *could be* abused by someone else. [redacted]hat some door-to-door solicitors might

be burglars in disguise, for instance, cannot support punishing solicitation.

These principles hold true in cases where, as here, the government's crime prevention interest is undeniably strong. Indeed, the Court's First Amendment doctrine was forged in such cases. Under our constitutional system, guilt is personal. Petitioner's speech was not itself criminal or part of a criminal transaction the State may punish. His conviction, therefore, may not stand.

III. The North Carolina Supreme Court was wrong to assume that Section 202.5 should be reviewed with less rigorous First Amendment scrutiny. Section 202.5 is not conduct regulation. Neither is it like any law this Court has considered, let alone upheld, under the test applicable to content-neutral time, place, or manner regulations.

But when a law is as plainly deficient as this one is, the level of scrutiny applied does not make a difference. Even treating Section 202.5 as if it were a garden-variety time, place, or manner regulation cannot save it. It is not narrowly tailored; it does not leave open ample alternative channels for the First Amendment activities it burdens; and it does not directly or effectively further the government's interest.

The essence of the narrow tailoring requirement is that a law may not pursue its purposes by proscribing a substantial quantity of speech that does not involve the targeted evil. Section 202.5 punishes vast amounts of protected activity to reach the minuscule fraction that implicates the government's purpose. Indeed, the statute prohibits the speech of

too many people, for too long, over websites the State acknowledges do not implicate its concerns.

As with any law that is so grossly overinclusive, there are many less restrictive alternatives to Section 202.5's boil-the-ocean approach. The most obvious would be a law making it a crime to access websites for nefarious purposes. This alternative, like others, would have the cardinal virtue of not convicting individuals for exercising their First Amendment rights. It would also apply to *everyone* who behaved culpably. Indeed, the prosecutor in this case acknowledged that the legislature "could have" enacted a number of alternatives that focused only on blameworthy access, but it did not do so.

Nor can it credibly be said that Section 202.5 leaves open ample alternative channels. The statute excludes registrants from the central platforms where, today, any North Carolinian can interact with his elected representatives, obtain a free online education, and find gainful employment. As a practical matter, the patchwork of alternatives the North Carolina Supreme Court proffered is insufficient.

For all the speech it burdens, Section 202.5 pursues its avowed objective in ways that are oddly indirect and ineffectual. For example, the statute's key criterion—the creation of personal profiles—is part of what experts say makes these sites safer and differentiates them from anonymous chat sites, which attract risk-taking adolescents and would-be offenders. Under Section 202.5, law enforcement will likely identify only those who post publicly while those who gather information surreptitiously will evade detection. The law does not attempt to address

online exploitation by nonregistrants, who account for the vast majority of such offenses.

IV. Petitioner's conviction was plainly unconstitutional. Indeed Section 202.5 cannot be constitutionally applied under any circumstance. Even if such a case could be imagines, the law would still warrant facial invalidation as substantially overbroad. Petitioner is one of more than 1,000 North Carolinians who have been charged with an offense that criminalizes speech without any proof of harm or criminal intent. And he is one of approximately 20,000 State residents whom Section 202.5 relegates to a lower tier of Free Speech rights. This, "[t]he First Amendment does not permit." *Virginia v. Black*, 538 U.S. 343, 367 (2003) (plurality opinion).

ARGUMENT

I. Section 202.5's Prohibition on Accessing Social Networking Websites Punishes Core First Amendment Activity.

A. The Statute Imposes Serious Burdens on Quintessential First Amendment Activity.

Practically everything that happens on social networking websites—everything Section 202.5 punishes—is fully-protected, core First Amendment activity. Every hour of every day, millions of users rely on these sites to:

- Exercise their religion, *see, e.g.*, Pew Res. Ctr., *Religion and Electronic Media* (Nov. 6, 2014), http://pewrsr.ch/1tPEmyx; Tierney McAfee, *Tweets Be with You: Pope Francis' Top 10 Greatest Twitter Moments*, People (Sept. 19, 2015), http://bit.ly/2fYImgT;

- Petition their public servants, *see, e.g.*, Anjali Mullany, *Sore-Backed Newark Mayor Cory Booker Uses Twitter to Rescue Citizens, Dig Out Cars, Deliver Diapers*, N.Y. Daily News (Dec. 28, 2010), http://nydn.us/2hbp9rA;
- Peaceably assemble, *see generally* John D. Inazu, *Virtual Assembly*, 98 Cornell L. Rev. 1093 (2013);
- Associate with like-minded individuals, *see, e.g.*, Nolan Feeney, *Facebook's New Photo Filter Lets You Show Solidarity with Paris*, TIME (Nov. 14, 2015), http://ti.me/1HQ6W6w;
- Express themselves through music and art, *see, e.g.*, Mekado Murphy, *An Everyman Goes from YouTube to Journey*, N.Y. Times (Apr. 27, 2012), http://nyti.ms/10cZ61Y;
- Gather public information, *see, e.g.*, Gottfried & Shearer, *supra*;
- And watch cat videos, *see, e.g.*, Abigail Tucker, *How Cats Evolved to Win the Internet*, N.Y. Times (Oct. 15, 2016), http://nyti.ms/2e7mv2W.

"[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

The very reasons we have a First Amendment affirm the importance of including social networking sites within its protections. This Court has affirmed that the Freedom of Speech is a "fundamental personal right[] and libert[y]." *Schneider v. Town of Irvington*, 308 U.S. 147, 161 (1939). The First Amendment creates space for "intellectual individualism" and "freedom to differ," *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943), even when differences "invite dispute," *Texas v. Johnson*, 491 U.S. 397, 408 (1989). But the First Amendment guarantees "more than self-expression; it is [also] the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). Thus, the Court has recognized that the First Amendment serves "to assure [the] unfettered interchange of ideas for the bringing about of political and social change[]." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

The character and ubiquity of social networking sites have significantly affected the way individuals exercise their First Amendment freedoms. Any individual can do so with a click from any place, at any time. In a single day, for instance, a person might seek spiritual guidance from a verse on his pastor's Twitter feed. He could display a family photo on Instagram wishing a sibling in another city happy birthday. He might post in the "COWBOYS FANS ONLY!" Facebook group to celebrate a historic season with fellow fans. He could embark on a new career by searching LinkedIn for job openings. He might check Twitter to learn where a local food truck can be found for lunch. He could submit debate questions to

political candidates over YouTube or Facebook. *See, e.g.*, Paul J. Gough, *CNN's YouTube Debate Draws Impressive Ratings*, Reuters (July 25, 2007), http://reut.rs/2eAzk9e. Or he could communicate directly with the President of the United States on Twitter.

"[I]t is a prized American privilege to speak one's mind." *Bridges v. California*, 314 U.S. 252, 270 (1941). And today, Americans speak their minds—and engage in vast swaths of other First Amendment activity—primarily on social networking sites. For registrants in North Carolina, however, Section 202.5 makes doing so a felony.

B. Section 202.5 Directly Regulates the Freedom of Speech—Not Conduct.

The linchpin of the North Carolina Supreme Court's decision was its assumption that because Section 202.5 punishes "accessing" social networking websites, the law could be analyzed as "a regulation of conduct." Pet. App. 6a. Thus, the court held the burdens the law imposes on First Amendment activity are "only incidental[]." *Id.* 9a. That premise is seriously wrong as a matter of common sense and constitutional principle.

1. Time and again, this Court has held that the strictures of the First Amendment may not be evaded by ostensibly regulating some physical aspect of protected activity. The Court has emphasized the importance—for both the coherence of First Amendment doctrine and the "preserv[ation] of freedom"—of enforcing these "vital distinctions between words and deeds, between ideas and conduct." *Ashcroft v. Free Speech Coalition*, 535 U.S.

234, 253 (2002); *see also Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006).

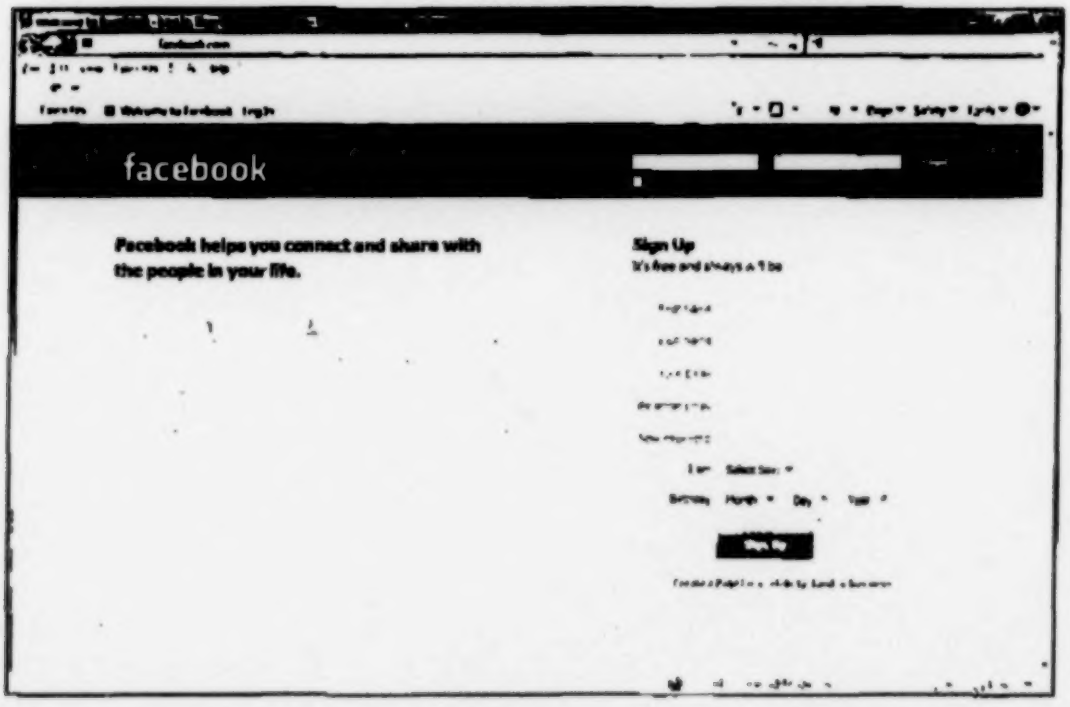
A law that forbids publication of magazines, for instance, does not become more tolerable by prohibiting the conduct of "purchasing or using ink." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011). And a law forbidding reading the New York Times would not become conduct regulation if it authorized punishment for physically picking up—or accessing—that newspaper. Accordingly, the Court has held that laws prohibiting activities such as picketing, *Frisby v. Schultz*, 487 U.S. 474, 488 (1988), solicitation, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 153 (2002), and leafleting, *Schneider*, 308 U.S. at 164, are speech—not conduct—restrictions.

So too here. What goes for the New York Times goes for nytimes.com—and for all the social networking websites at the core of Section 202.5's proscription. A law that aims to prevent constitutionally protected expression does not become "conduct" regulation, nor do its burdens on speech become "incidental," by making "access" to the means of communication the trigger for criminal liability.

To be sure, a legislature could have reasons unrelated to speech suppression for limiting the conduct of accessing websites—just as a government might have non-speech reasons for regulating the burning of a flag or draft card. *See Johnson*, 491 U.S. at 412-13 n.8; *United States v. O'Brien*, 391 U.S. 367, 375 (1968). For example, the government could regulate access to prevent a fragile governmental website from being inundated by users or to fairly

apportion bandwidth among soldiers stationed at a remote base.

But that is not what Section 202.5 does. By the State's own reckoning, the harms with which Section 202.5 is concerned do not involve access in itself, but rather the activities that accessing social networking websites enable. *See* BIO 27; Pet. App. 15a. Indeed, the State could not credibly claim otherwise. The conduct the statute makes criminal is complete when a person arrives at an innocuous landing page:



Mo. to Dismiss Hr'g, Defense Ex. 1 at 138; *see* J.A. 38-39.

The evils against which the statute is directed—abuse of these sites to facilitate harm to minors—are criminal in their own right. *See, e.g., Free Speech Coalition*, 535 U.S. at 251-52; N.C. Gen. Stat. § 14-202.3. But a law that aims to restrict abuses of the Freedom of Speech by preventing speech from

occurring is not an indirect regulation. *See Near v. Minnesota*, 283 U.S. 697, 722-23 (1931).

2. Even the North Carolina Supreme Court recognized as "apparent to any who access them" that the prohibited websites "provide . . . a means of communication." Pet. App. 9a. But it then embraced respondent's argument that the State's concern—about a would-be assailant's ability could also collect information to "facilitate [improper] contact"—is an interest unrelated to suppressing speech. *Id.* 13a

Decades of precedent are to the contrary. In decisions beginning with *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965), through *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976), and *Sorrell*, 564 U.S. at 577 (2011), the Court has made clear that receiving and "gathering" information are activities fully and independently protected under the First Amendment, not conduct that may be freely regulated and punished. When a citizen reads about the President's budget proposals in a public library, she is engaged in activity protected under the Free Speech Clause, even though she may never utter a word and even though the librarian would shush her if she did. When she gathers the same information by accessing Twitter or Facebook, her research does not become conduct.

What is true for the right to communicate information holds for the right to gather information. The fact that reporting on a celebrity's travel schedule might increase the risk of her being attacked does not support prohibiting a newspaper from publishing the story. Nor does it justify a law punishing readers for accessing that information

because a deranged fan might also read it and use the information to do her harm. Accessing available information and doing so for pernicious purposes are different things. *See Free Speech Coalition*, 535 U.S. at 251 ("There are many things innocent in themselves . . . that might be used for immoral purposes.").

Unlike that hypothetical law, Section 202.5's prohibition is not limited to accessing particular information from one particular source. It prohibits and punishes accessing a vast array of important websites without regard to what information—if any—the defendant gathers.

Indeed, in this case, the State never alleged that petitioner gathered information at all. The entirety of the charge giving rise to his felony conviction was that he used a medium on which another person, one who harbored criminal intent, might find useful information.

C. That Section 202.5 Targets Speech of Registrants Does Not Place the Statute Beyond the First Amendment.

It is hard to imagine that a law anything like Section 202.5 would have been enacted, let alone upheld as conduct regulation, had it targeted any subset of the State's population other than persons on the registry. In fact, when the North Carolina Supreme Court confronted a First Amendment challenge to the State's generally applicable "cyberstalking" statute, it took a very different view. In that case, the court recognized that "[p]osting information on the Internet—whatever the subject matter—can constitute speech as surely as stapling

flyers to bulletin boards." *State v. Bishop*, 787 S.E.2d 814, 817 (N.C. 2016). And it held "[s]uch communication does not lose protection merely because it involves the 'act' of posting information online," explaining that "much speech requires an 'act' of some variety." *Id.* at 818. To the extent North Carolina's General Assembly and its courts believed that registrants' online activity warrants diminished First Amendment protection, this Court's precedents instruct otherwise.

1. The Court has steadfastly "decline[d] to carve out from the First Amendment" new "categories of speech" deemed unprotected. *United States v. Stevens*, 559 U.S. 460, 472 (2010). The notion that new categories of *speakers* may be made "stranger[s]" to the First Amendment, *see Romer v. Evans*, 517 U.S. 620, 635 (1996), is as "startling and dangerous" as the one *Stevens* rejected, 559 U.S. at 470.

Free Speech rights are not mere "interests" subject to legislative balancing, *see* 559 U.S. at 471-72, nor do "they derive from the beneficence of the state," *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012). These rights are "fundamental" and "personal." *Schneider*, 308 U.S. at 161. A law forbidding the expression that *Cohen v. California*, 403 U.S. 15 (1971), held protected, but which permitted jackets that said "Down with the Draft!" would itself be a serious First Amendment violation. *See id.* at 26. But much more grave would be a law that forbade all people named Cohen from speaking on the subject of conscription. A state has no power to deprive any "person or class"—including those subject to registration under North Carolina law—"of the right to use speech to strive to establish worth,

standing, and respect for the speaker's voice." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340-41 (2010).

2. That the class singled out for disadvantage by Section 202.5 is defined by past criminal convictions cannot render this bedrock principle inoperative. More than eighty years ago, this Court settled that the "constitutional freedom[s]" of the First Amendment may not be forfeited on account of prior "derelictions." *Near*, 283 U.S. at 720. Indeed, *Near* invalidated a law that withheld First Amendment rights based on prior abuses of those same rights. *Id.*

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), the Court vindicated the First Amendment rights of convicted persons, including some still incarcerated, to commercially publish accounts of their crimes. *Id.* at 108, 123. In striking down New York's "Son of Sam" law, the Court understood that some of those narratives would be offensive and would cause victims "anguish" through "reliving their victimization." *Id.* at 118. But the Court also recognized the various works of enduring value the law would have burdened. *Id.* at 121-22.

Accordingly, whatever restrictions are permissible when subjecting a person to government supervision pursuant to a lawful sentence, petitioner and other registrants, who are "no longer on the 'continuum' of state-imposed punishments," *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014) (citing *Samson v. California*, 547 U.S. 843, 848 (2006)), are entitled to "the full protection of the First Amendment," *id.* at 572. *See Pell v. Procunier*, 417 U.S. 817, 822 (1974) (Even while incarcerated, "a

prison inmate retains those First Amendment rights . . . not inconsistent with his status as a prisoner or with the legitimate penological objectives.").

A person who has completed his term of criminal supervision and fully regained his liberty may not be subject to warrantless searches merely because he was once convicted of an offense. *Cf. Samson*, 547 U.S. at 848. (Here, for example, North Carolina's requirement that petitioner submit to suspicionless searches lasted only during supervised probation. *2002 Judgment, supra.*) And it would be unprecedented and wholly anomalous to treat the "inalienable" right of Free Speech to be subject to life-long or decades-long post-release diminishment. Petitioner's First Amendment rights were abridged when Section 202.5 took effect in 2009, a half-decade *after* he completed his sentence. His rights continue to dwindle as more websites meet the broad statutory definition. *See infra* 56-57.

3. Nor can the General Assembly's belief that registrants, as a group, pose a higher likelihood of future offending than other residents supply the predicate for this unprecedented First Amendment regime. The ordinance invalidated in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), which permitted labor picketers to demonstrate but barred all others, was justified on the ground that "nonlabor picketing is more prone to produce violence." *Id.* at 100. In rejecting the City's defense, the Court held that the First Amendment requires government to make "[p]redictions about imminent disruption . . . on an individualized basis, not by means of broad classifications." *Id.* at 100-01.

Persons on North Carolina's registry are highly heterogeneous in many respects. (Many were not even convicted of a sexual offense or one involving children or the use of computers.) But they do share one common characteristic: Almost all registrants—unlike the protesters in *Mosley*—have already been subject to assessment "on an individualized basis" during their time under State criminal justice supervision. They also remain subject to close, ongoing law enforcement monitoring. That makes restrictions imposed based on statistical generalizations especially unwarranted. *See Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997) (upholding statute that "narrow[ed] the class of persons eligible for confinement to those who are unable to control their dangerousness").

II. North Carolina May Not Criminally Punish First Amendment Activity That Neither Causes Harm Nor Was Intended to Cause Harm.

Section 202.5 imposes criminal punishment for First Amendment activities that do not cause any harm and are not undertaken for criminal purposes. The thesis of the statute, accepted by the court below—that combatting serious criminal harm can justify any preventative measures, including speech suppression—is one the Court confronted and rejected in its earliest cases enforcing the First Amendment. This Court has made clear that the government may not criminally punish First Amendment activities based on the potential that someone will abuse those rights. Section 202.5 represents "a dramatic departure from" this "constitutional tradition." *Watchtower Bible & Tract*

Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 166 (2002).

1. The First Amendment does not permit the government to breach the "vital distinction[]" between protected speech and criminal "deeds." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002). Thus, in *De Jonge v. Oregon*, 299 U.S. 353 (1937), the Court overturned the defendant's conviction for speaking at a meeting of a group that sought to overthrow the government by force. *Id.* at 357, 361-62. The Court announced a categorical rule that "participation in a peaceable assembly and a lawful public discussion" may not be "the basis for a criminal charge." *Id.* at 365; *accord Herndon v. Lowry*, 301 U.S. 242, 259-60 (1937). While Free Speech rights can be abused for criminal purposes, the Constitution permits "legislative intervention" only to "deal[] with the[ir] abuse." *De Jonge*, 299 U.S. at 364-65.

The Court has similarly rejected speech suppression measures based on the *possibility* that speech rights will be abused. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), the Court struck down a ban on door-to-door canvassing. *Id.* at 149. The law's premise was indistinguishable from the one animating Section 202.5: "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises." *Id.* at 144.

These early First Amendment cases establish basic principles restricting criminal punishment to persons proven to have acted with both "an evil-doing hand" and "an evil-meaning mind" apply with

maximal force when protected speech is targeted. *See Morissette v. United States*, 342 U.S. 246, 251-52 (1952). Early decisions such as *De Jonge* and *Herndon*, like later ones addressing the power to punish "incitements," demand proof of "clear and present danger." The defendant's own activity must itself be "[1] directed to inciting or producing [2] imminent lawless action and [3] [be] likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). *See Bridges v. California*, 314 U.S. 252, 263 (1941) ("[T]he substantive evil must be extremely serious and the degree of imminence extremely high.").

These rules apply even "where the substantive evil sought to be prevented by the restriction is 'destruction of life or property.'" *Bridges*, 314 U.S. at 262 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940)). In such cases, the First Amendment maintains stringent limits on the power to punish: When activity protected by the First Amendment is neither criminal in itself, *see R. A. V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (recognizing that "a law against treason . . . is violated by telling the enemy the Nation's defense secrets"), nor an "integral part" of a criminal transaction, *see Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949), it may be punished only upon proof of both personal culpability and a direct and immediate connection to the harm.

2. Those principles are not relics of a bygone constitutional era. In *Free Speech Coalition*, this Court considered a federal statute prohibiting possessing and distributing "virtual child pornography": images that depict minors engaging in

sexually explicit conduct—including intercourse, bestiality, masturbation, or masochistic abuse, 18 U.S.C. § 2256(2) (2000)—but in fact were computer-generated or involved adult actors, 535 U.S. at 239-41.

In enacting that law, Congress had conducted extensive hearings and made detailed legislative findings that possession of virtual child pornography would contribute to and facilitate actual sexual abuse, by increasing pedophiles' "appetites" for contact with children and by enabling them to more effectively accomplish their criminal ends by overcoming a young victim's resistance. 535 U.S. at 241-42, 245. Congress further found that the government would have difficulty convicting those guilty of possessing actual child pornography because the virtual depictions were effectively indistinguishable. *Id.* at 242.

This Court recognized the "repugnan[ce]" of the behavior against which the measure was directed: "the sexual abuse of a child." 535 U.S. at 244. And the Court accepted Congress's judgment that virtual child pornography could be used by "subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the[ir] impulses." *Id.* at 245.

But these congressional findings could not justify the law. The Court first identified the constitutional difference between virtual and actual child pornography, the possession of which is beyond First Amendment protection, *see Osborne v. Ohio*, 495 U.S. 103, 111 (1990). Actual child pornography, by recording abuse, is "intrinsically related" to the crime of sexually abusing children. *Free Speech Coalition*,

535 U.S. at 249 (quoting *New York v. Ferber*, 458 U.S. 747, 759 (1982)). Virtual child pornography "records no crime." *Id.* at 250.

Without disturbing Congress's findings concerning the potential to facilitate sexual abuse, the Court emphasized that such offenses would "not necessarily follow from the speech, but [would] depend[] upon some unquantified potential for subsequent criminal acts." 535 U.S. at 250. Nor could pedophiles' ability to use virtual pornography to solicit minors suffice. *Id.* Virtual child pornography, the Court explained, is like "many [other] things innocent in themselves . . . that might be used for immoral purposes," and the possession of which may not be criminalized on that basis. *Id.* at 251-52.

Accordingly, the Court held, the First Amendment directs the government to punish those adults who actually abuse minors or who actually provide children inappropriate but constitutionally protected material in an attempt to solicit them. 535 U.S. at 251-52. As for the argument that the prohibition should be upheld based on the increased difficulty of convicting individuals who possessed actual child pornography, the Court explained that would "turn[] the First Amendment upside down." *Id.* at 255.

3. Section 202.5 flouts these core First Amendment prohibitions. The statute does not limit punishment to speech (or gathering information) that is criminal in itself or integral to the crime that concerned the General Assembly. The crime it creates involves "no attempt, incitement, solicitation, or conspiracy." 535 U.S. at 253. Nor does it require proof that the registrant accessed a website for any

nefarious purpose; the offense is complete with access alone. Indeed, as petitioner's case shows, even compelling proof that a registrant *did not* access a site for an illicit reason is of no moment under Section 202.5. *Cf. id.* at 255-56 (discussing the possibility that "an affirmative defense [could] save a statute from First Amendment challenge"); *United States v. Stevens*, 559 U.S. 460, 477-80 (2010) (acknowledging, but finding insufficient, an exemption for depictions of unlawful animal cruelty that have "serious" value).[4]

This law is an even more thorough affront to First Amendment principles than the one invalidated in *Free Speech Coalition*. The First Amendment activity in *Free Speech Coalition* was surely lower on "the hierarchy of First Amendment values," *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)), than the wide range of First Amendment activity prohibited by Section 202.5, which, as this case shows, includes praising God and reporting on judicial proceedings.[5] And the risk *Free Speech*

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[4] To be sure, Section 202.5 requires that an offending registrant "know" that minors can "become members" on the social networking site. But like the mens rea requirement held inadequate in *Elonis v. United States*, 135 S. Ct. 2001 (2015), whether a registrant knows that minors use the same social networking website is not "the crucial element separating legal innocence from wrongful conduct," *id.* at 2011 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)), namely an intent to cause them harm.

[5] Recent decisions of this Court have held the First Amendment protects similarly low-rung speech. *See, e.g.*,

Coalition held constitutionally insufficient (that pedophiles might put virtual pornography to predatory use) is surely far more substantial than the "unquantified potential for subsequent criminal acts" here, 535 U.S. at 250—that of a registrant's accessing a societally important website to cause harm.

But the principle is the same: North Carolina "may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" 535 U.S. at 253 (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam)). That is exactly what the decision in this case did. It allowed the State to punish petitioner's access—activity that was "void of criminality," *Herndon*, 301 U.S. at 261—on the ground that somebody "*could* actually gather information about minors," Pet. App. 25a (emphasis added).

III. Section 202.5 Fails Any Form of First Amendment Scrutiny.

Section 202.5 is so "obvious and flagrant" a violation of the First Amendment, *Mills v. Alabama*, 384 U.S. 214, 219 (1966), that there is no real need for scrutiny under this Court's modern tests to

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United States v. Alvarez, 132 S. Ct. 2537, 2548 (2012) (falsely claiming to have won the Medal of Honor); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 789 (2011) (virtually raping and dismembering women on video games sold to minors); *Snyder v. Phelps*, 562 U.S. 443, 448 (2011) (picketing outside a servicemember's funeral with signs reading "You're Going to Hell"); *Stevens*, 559 U.S. at 465 (videos depicting animal cruelty, including ones showing women crushing puppies to death with high-heeled shoes).

perceive its defects. Nor, as the Justices dissenting below explained, is it necessary to resolve definitively which tier to assign it to. *See* Pet App. 34a; *see, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164 (2002). Even if reviewed under the First Amendment test applicable to garden-variety time, place, or manner regulations, Section 202.5 fails dramatically.

The court below was wrong to assume less rigorous First Amendment scrutiny was appropriate. But it was able to pronounce Section 202.5 "constitutional in all respects" only by adopting a version of the time, place, and manner test that was intermediate in theory, but supine in fact.

A. Section 202.5 Warrants Close Judicial Scrutiny.

In deciding how closely to scrutinize the statute, the court below assumed that Section 202.5 should be analyzed as a conduct-regulating law that imposes incidental burdens, *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), or as a content-neutral time, place, or manner restriction, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *See* Pet. App. 12a.

Section 202.5 is neither. The North Carolina Supreme Court's decision to review Section 202.5 under the relatively forgiving *O'Brien* test cannot be defended. Section 202.5 is unconcerned with *any* "nonspeech element." *O'Brien*, 391 U.S. at 376. It prohibits access *only* as a means of preventing constitutionally-protected expression and information-gathering over the proscribed websites.

See supra 21-25.[6] Nor is Section 202.5 properly analyzed under the *Ward* test. It is unlike any law this Court has considered as a time, place, or manner restriction. It is speech suppression, pure and simple.

1. The regulations this Court's cases have analyzed under the time, place, and manner test have operated on a limited scope. In *Ward*, the Court upheld a regulation governing how sound would be amplified in a performance venue in a public park. 491 U.S. at 803. The requirements were imposed on all users of the facility and only after previous noise control measures had been tried and failed. *Id.* at 785-87. And in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), the Court struck down a Massachusetts law that imposed regulations only in a thirty-five-foot zone surrounding abortion clinics. *Id.* at 2526, 2541.

Section 202.5's prohibition on accessing social networking sites is incomparably larger and more indiscriminate. If New York barred musicians from performing in the entire State or if Massachusetts made it a crime to protest in any city with an abortion clinic, those hypothetical measures would still be, by orders of magnitude, *more* "surgical[ly] precis[e]" than North Carolina's law here, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 798 (1994) (Scalia, J., concurring in judgment in part and dissenting in part). Section 202.5 is continental, indeed global, in scope: YouTube has more than

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[6] Respondent does not appear to disagree. Confronted with petitioner's comprehensive showing at the certiorari stage that the *O'Brien* test cannot apply, the State's response was simply, that "is an interesting question." BIO 21.

1 billion members; Facebook is fast approaching 2 billion; and hundreds of millions of others log on regularly to Twitter, LinkedIn, Instagram, and Google+. *See* Facebook, *Facebook Q3 2016 Results* 5 (Nov. 2, 2016), http://bit.ly/2hhzVKE; *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1109-11 (D. Neb. 2012).

2. Moreover, the North Carolina Supreme Court's analogy to *Ward* ignores the *reason* for this Court's greater solicitude for time, place, or manner regulations: The job of governance—including the responsibility to administer public fora in which Free Speech is welcome—necessitates regulations that impose some burden on First Amendment activity. "[T]wo parades cannot march on the same street simultaneously." *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (citing *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941)). And though public streets, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hague v. CIO*, 307 U.S. 496, 515 (1939) (plurality opinion), a "demonstration . . . on a large street during rush hour might put an intolerable burden on the essential flow of traffic," *Grayned*, 408 U.S. at 115-16 (citing *Cox v. Louisiana*, 379 U.S. 536, 554 (1965)).

This focus on even-handed administration of public spaces to prevent actually incompatible activities is the *sine qua non* of time, place, or manner regulations. For example, government may ban demonstrations outside a school during the school day when they "materially disrupt[] classwork." *See Grayned*, 408 U.S. at 118 (quoting

Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 513 (1969)).

This concern is not implicated by social networking sites because one person's accessing a site is not in any way incompatible with another's. There can be two parades on Twitter at the same time—or two hundred. Scarcity is not an issue. For example, sixty *hours* of video content are uploaded to YouTube every minute. YouTube, *One Hour Per Second*, http://www.onehourpersecond.com. These sites permit users to read, watch, and experience only what they want—and only from the sources they choose to hear from. And the only people able to view the user's own content or profile information are those with whom the user has chosen to share that information.

This is even truer with respect to non-adults who establish accounts on social networking websites. In response to federal regulations restricting website operators' collection of certain information from minors younger than thirteen, *see* Children's Online Privacy Protection Rule, 16 C.F.R. § 312, most sites bar those children from creating accounts altogether. *But see* ConnectSafely, *A Parent's Guide to Snapchat*, http://bit.ly/1b3oA5Y (describing Snapchat app for children called "SnapKidz," which does not allow users to add friends or share information at all). Leading sites have prohibited users under sixteen from sharing information with adults outside their networks. *See supra* 5. Accordingly, the fact that the statute "limits" its criminal penalty to *sites* that permit minors (that is, not even to minors' personal pages) does not make petitioner's accessing

Facebook any more "materially disrupt[ive]" in any way.

3. The decision below ignored a further reason not to afford Section 202.5 the benefit of the *Ward* rule. This Court does not treat measures like Section 202.5 that disfavor the speech of a subset of speakers as content-neutral time, place, or manner restrictions. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the regulation prohibiting camping applied to anyone who sought to use Lafayette Park and the Washington Mall. *Id.* at 290-92, 297. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the law prohibiting picketing at residences applied to all residential picketers. *Id.* at 477. And in *Ward*, the noise regulation applied to all who performed at the public bandshell. 491 U.S. at 787.

To be sure, an even-handed noise regulation could burden rock musicians more than chamber musicians, but "an incidental effect on some speakers [and] not others" does not render the time, place, and manner framework inoperative. *Ward*, 491 U.S. at 791. By contrast, the Court has consistently rejected laws—like Section 202.5—that facially "discriminat[e] among different users of the same medium for expression," *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court refused to uphold as a valid time, place, or manner restriction a municipality's "ban on the use of newsracks that distribute 'commercial handbills,' but not 'newspapers.'" *Id.* at 429. It did so even though the City's aesthetic concerns would have supported an even-handed ban—and even though the selective ban did not reflect "animus toward the ideas

contained within respondents' publications." *Id.*; *accord Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193-94 (1999) ("Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

These decisions recognize that when the government targets certain speakers, it "commit[s] a constitutional wrong" that is distinct and "[q]uite apart from" the type of content-based regulation the Constitution forbids. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). Broad speech suppression, "convenien[t]" in many circumstances, is much more likely to be "the path of least resistance" when only a subset of speakers is disadvantaged. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014); *see Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.").

4. The North Carolina Supreme Court's remaining—and only explicit—reason for subjecting Section 202.5 to less rigorous scrutiny also fails. The decision highlighted that the law is "content neutral," Pet. App. 11a-12a, in that petitioner would have been punished whether he said "God is good" or "God is dead," and it was not motivated by disapproval of the opinions or ideas he might express. But this Court has made clear that the limitations the First

Amendment imposes go beyond a prohibition on government-enforced orthodoxy. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (A statute can violate the First Amendment even if it does not evince "an[y] improper censorial motive." (quoting *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)). Regardless of their intent, "[l]awmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011).

Moreover, this law achieves its "content neutrality" in a constitutionally unsavory way: by punishing access categorically, before registrants have an opportunity to speak. In *Near v. Minnesota*, 283 U.S. 697 (1931), the State enacted a gag law on newspapers previously found to have published "malicious, scandalous and defamatory" speech. *Id.* at 701-02. It was hardly a First Amendment virtue that the law did not specifically bar further libelous speech, but instead chose to prevent those newspapers from publishing altogether. *See id.* at 722-23; *accord Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 589 (1976) (Brennan, J., concurring in judgment) ("A free society prefers to punish the few who abuse the rights of speech *after* they break the law than to throttle them and all others beforehand." (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975)). And the measure struck down in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987)—which prohibited all "First Amendment activities" inside an airport, *id.* at 574—did not become less suspect because it did not single out particular content. The vast and

indiscriminate character of Section 202.5's prohibition is likewise reason for vigilant, not diminished, First Amendment scrutiny.

B. Section 202.5 Cannot Survive Even Garden-Variety Intermediate Scrutiny.

Even if Section 202.5 were to be analyzed under the test that governs time, place, or manner regulations, it could not survive scrutiny. Under the Court's precedents, such a law may be upheld only if it is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication." *Ward*, 491 U.S. at 791. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 134 S. Ct. at 2540.

Section 202.5 fails each prong. The statute burdens a vast amount of protected and high-value speech that is unrelated to the evil the State seeks to address. The General Assembly failed to employ means of achieving North Carolina's interest that burden far less speech. And the alternative channels it leaves open are manifestly inadequate. Finally, it does not effectively further the State's interest.

The North Carolina Supreme Court could hold otherwise only by flipping the *Ward* test on its head: by ignoring wholesale the harms that Section 202.5 poses to First Amendment activities, declining to consider any less restrictive means that the State could employ to achieve its purpose, and excusing the State's far-reaching ban because it fell short of

"impos[ing] a blanket prohibition against Internet use." Pet. App. 15a.

1. Section 202.5 Burdens Far More Speech Than Is Necessary.

a. The very "essence of [the] narrow tailoring" requirement is that a law pursue its purposes without "significantly restricting a substantial quantity of speech that does not create the . . . evils" at which it is directed. *Ward*, 491 U.S. at 799 n.7. Accordingly, the Court has long held that laws completely banning an entire medium of communication are invalid unless "each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485. For instance, a law prohibiting handbilling in a city may not be upheld as a narrowly tailored anti-littering law, because not every pamphlet is litter. *See Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939); *see also Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (similar); *Martin v. City of Struthers*, 319 U.S. 141, 148-49 (1943) (door-to-door solicitation). In contrast, a law banning all signs on utility poles *can* be upheld because every sign implicates the government's aesthetic interest. *See Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 808, 810 (1984); *see also Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 969 (1984) (distinguishing "between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in").

Section 202.5 regulates "in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. In

quantitative terms, the vast majority of the activity that Section 202.5 punishes does not implicate the evil that animates the statute: causing harm to minors online. *See* Pet. App. 13a. As the Seventh Circuit recognized with respect to a similar law, "illicit communication" with, and illicit information-gathering about, website users under eighteen surely "comprise[] a minuscule subset of the universe of social network activity" that the statute burdens. *Doe v. Prosecutor*, 705 F.3d 694, 699 (7th Cir. 2013); *accord Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1111 (D. Neb. 2012) ("No reasonable person could deny that fact.").

b. Indeed, even if Section 202.5 punished accessing only one social networking website—say, Twitter—and even if it applied only to a subset of registrants whom the State determined pose a high risk of improper Internet use, the statute *still* would not be sufficiently tailored. Under this Court's precedents, a law is not "narrowly tailor[ed]" if the "substantive evil" it aims to prevent is only a "possible byproduct of the activity" it proscribes. *See Frisby*, 487 U.S. at 485-86 (quoting *Taxpayers for Vincent*, 466 U.S. at 810).

But there is no dispute that Section 202.5 prohibits speech on many more sites than that. Its reach extends not only to every site colloquially understood to be a "social networking website," but also many others, such as bettycrocker.com, that undeniably satisfy the broad statutory definition. *See supra* 10.

In practical effect, Section 202.5 burdens a significant quantum of First Amendment activity that even the State itself has acknowledged is not

"necessary to further [its] legitimate interests." *Ward*, 491 U.S. at 799. Although the State denied any need to prohibit access to nytimes.com, *see* BIO 30-31, that site falls within the statutory definition. And the North Carolina Supreme Court assumed that it does. *See supra* 13. At the very least, having read the opinion below, no registrant seeking to avoid punishment would visit that site. *See United States v. Williams*, 553 U.S. 285, 304 (2008) (holding that burdens on speech include those resulting from "unclear" applications). Indeed, that is what the arresting officer here would advise. *See* J.A. 78 ("The best way for . . . somebody not to get in trouble is to not do something.").[7]

c. In drafting Section 202.5, the General Assembly made no effort to avoid burdening the First Amendment activity of registrants, whom the State—through its own courts and probation authorities—has determined do not require further supervision. The statute also does not identify particular "offenders who pose a factually based risk to children through the use or threatened use of the banned sites or services." *Nebraska*, 898 F. Supp. 2d at 1111. Rather, the statute's proscription attaches based solely on an individual's reportable conviction—

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[7] In its Brief in Opposition, respondent insisted that nytimes.com is excluded because it falls outside the "natural meaning" of a "social networking Web site." BIO 31. But the "natural meaning" of a term is irrelevant when the statute itself supplies a definition. *See Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935). No "average man," *id.*, would consider Skype a social networking website. Yet North Carolina has prosecuted a registrant for accessing that site. *See supra* 8 n.2.

including decades-old offenses, sexual offenses not involving minors or the use of the Internet, and ones that would not even trigger registration if committed in North Carolina.

In view of Section 202.5's vast and unnecessary breadth—criminalizing all access, to all social networking websites, by all registrants, for any purpose, for many years—the North Carolina Supreme Court's concession that there are "some areas" in which "the statute could have been drafted even more narrowly" is a severe understatement. Pet. App. 15a-16a.

2. There Are a Multitude of Less Speech-Restrictive Options.

Nor can the State satisfy its obligation to "show[] that it seriously undertook to address the problem with less intrusive tools readily available to it" or even that it "considered different methods" that would burden far less protected speech. *McCullen*, 134 S. Ct. at 2539. To be sure, this Court's time, place, or manner cases do not limit governments to the *least* restrictive means of achieving their purposes. *Id.* at 2535. But the same decisions teach that the existence of genuine, *less* restrictive alternatives highlight just how poorly tailored a law is. *See id.* at 2537-40.

a. The "obvious method[] of preventing" sexual abuse of minors and gathering of information for that purpose is "the punishment of those who actually" do those deplorable things. *Schneider*, 308 U.S. at 162. Indeed, before passing the law now codified as Section 202.5, the General Assembly had before it, but did not enact, provisions that would have

increased penalties for exploiting or soliciting minors. *See* S.B. 132–2d ed., 2007 Gen. Assemb., Reg. Sess. §§ 2-4, 6 (N.C. 2007); *see also Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach . . . do not provide sufficient deterrence, perhaps those sanctions should be made more severe.").

There is no question that North Carolina can and does harshly punish anyone who sexually abuses a minor. *See, e.g.*, N.C. Gen. Stat. § 14-190.6 et seq.; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("Congress may pass valid laws to protect children from abuse, and it has."). Nor is there any doubt that a law criminalizing the gathering of information on social networking sites (or elsewhere on the Internet) for the purpose of targeting minors would be constitutional. Such a law would track the approach of existing North Carolina laws, which punish computer activities—including "access," N.C. Gen. Stat. § 14-458.1—"for the purpose of" causing harm, *id.* § 14-196.3(b)(2). In fact, such behavior may already be punishable: North Carolina could prosecute as criminal attempts "harvest[ing] information to facilitate contact with potential victims," BIO 11. *See, e.g.*, *State v. Ellis*, 657 S.E.2d 51, 55 (N.C. Ct. App. 2008); *accord* N.C. Gen. Stat. § 14-2.5.[8]

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[8] To the extent North Carolina is concerned with solicitation of minors online, the State already has a law proscribing such behavior. *See* N.C. Gen. Stat. § 14-202.3;

Such measures would apply to everyone—including the many non-registrants who perpetrate these repugnant and "most serious crime[s]." *Free Speech Coalition*, 535 U.S. at 244; *see infra* 58 (discussing findings that registrants account for a small percentage of Internet-enabled crimes against minors). North Carolina has never enacted such a generally applicable, anti-harvesting law.

b. The General Assembly could have enacted a variety of other statutes that distinguish between wrongful and innocent accessing of websites. In fact, the prosecutor in this case, recognizing jurors' potential discomfort with Section 202.5's breadth, hypothesized a statute punishing "specific contact on Facebook with minor children," and one punishing "access[ing] Facebook [to] say specific things that might entrap children." Trial Tr. 253-54. Under either of the prosecutor's hypothetical statutes, petitioner would have been acquitted.

c. The General Assembly alternatively could have enacted a rule of construction or an affirmative defense providing that registrants like petitioner, who did not access a website for an illicit purpose, have committed no crime. For example, North Carolina's criminal prohibition on "cyberstalking" includes a specific directive that the law may not be "appl[ied] to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others."

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accord McCullen, 134 S. Ct. at 2537-38 & n.7 (pointing to other laws in Massachusetts furthering the interest asserted).

N.C. Gen. Stat. § 14-196.3(e). *See also Free Speech Coalition*, 535 U.S. at 259 (Thomas, J., concurring) (suggesting that "a more complete affirmative defense could save a statute's constitutionality").

To be sure, relying on an affirmative defense would—perhaps unconstitutionally—put the burden on the speaker to "prove, on pain of felony conviction," that his speech was protected. 535 U.S. at 255. But at the very least, this alternative would provide some means for those whose access was entirely blameless to avoid a felony conviction.

d. In its initial defense of the law in this Court, the State emphasized that government should not be required to wait until criminal harm is complete before taking action. *See* BIO 28. But laws punishing attempts and solicitation are themselves "preventative measures," *id.*, and there are many other such measures that can be taken consistently with the First Amendment.

Law enforcement agencies across the country make use of undercover operations to identify and prosecute individuals who pose a serious threat to minors online. *See, e.g.*, Noah Fromson, *28 Accused Sexual Predators Arrested in Sting Operation*, KPRC (July 5, 2016), http://bit.ly/2hnaeZB. To the extent the State has special concerns about particular persons on the registry, effective monitoring and investigation are especially practicable. Law enforcement knows where each registrant lives and works at any given time, and what their "online identifier[s]" are. *See* N.C. Gen. Stat. § 14-208.7(b)(7); 42 U.S.C. § 16901 et seq.; *see also id.* § 16915b.

Moreover, experts who have seriously examined the problem of online exploitation have identified specific educational and preventative measures taken by parents, schools, mental health professionals, teenage users themselves, and social networking site operators that are effective. *See Enhancing Child Safety, supra*, at 4-6; *see also infra* 59-60. In fact, initial drafts of Section 202.5 would have required website operators to ensure that teenage account holders obtained adult permission before establishing accounts and to afford their parents ongoing access. *See* S.B. 132–2d ed., 2007 Gen. Assemb., Reg. Sess. § 8 (N.C. 2007). North Carolina failed to enact that provision.

e. The State already imposes standard restrictions for registrants on supervised probation, *see* N.C. Gen. Stat. § 15A-1343(b2), and post-release supervision, *see id.* § 1368.4(b1). Every registrant under either program must "[s]ubmit at reasonable times to . . . warrantless searches of the[ir] . . . computer or other electronic [devices]." *Id.* §§ 15A-1343(b2)(9), 1368.4(b1)(8); *see Samson v. California*, 547 U.S. 843, 857 (2006). At sentencing, further restrictions, tailored to the offender's circumstances, may also be imposed. *See* N.C. Gen. Stat. §§ 15A-1343(b2)(6), 1368.4(c).

North Carolina courts have imposed limited-duration conditions. *See, e.g., State v. Johnston*, 473 S.E.2d 25, 33 (N.C. Ct. App. 1996) (banning working in establishments that sell sexually explicit material). Federal courts exercising similar authority have approved conditions that include pre-approval of Internet use, *see United States v. Zinn*, 321 F.3d 1084, 1092-93 (11th Cir. 2003); mandatory

installation of filtering software, *see United States v. Holm*, 326 F.3d 872, 879 (7th Cir. 2003); and restricted access to a narrow set of websites, *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003).

When imposing these conditions, courts have recognized that even persons under active criminal justice supervision retain First Amendment rights, and that much of what they would do over the Internet is benign, personally important, and constitutionally protected—like earning a living and communicating with their families. But when such provisions "result[] in a far greater deprivation of [the defendant]'s liberty than [i]s reasonably necessary," courts have invalidated them. *United States v. Sales*, 476 F.3d 732, 736 (9th Cir. 2007); *see United States v. Peterson*, 248 F.3d 79, 83-84 (2d Cir. 2001) (same).

Here, given the opportunity to evaluate petitioner's individual circumstances, the sentencing court in the 2002 case declined to impose any such Internet or computer restrictions during his period of probation. *See 2002 Judgment*, *supra*. Nor did the State, at any point during the course of his probation, seek to impose any further restraints. *Id.* And just as the State has never pointed to anything inculpatory in the documents it obtained from Facebook, or from any random search of petitioner's Internet-enabled devices during his probation period.

f. To the extent there are individuals for whom the State believes post-sentence restrictions are genuinely necessary, North Carolina might adopt a regime like the one this Court approved in *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997). The State could identify persons—presumably a subset of those it

already subjects to life-time twenty-four-hour satellite monitoring, *see* N.C. Gen. Stat. §§ 14-208.40(a)(1), 208.41(a)—whose proven lack of volitional control makes post-sentence First Amendment restrictions truly necessary. *See Hendricks*, 521 U.S. at 360 (upholding post-sentence confinement of offender who could not "control the urge" to molest children). North Carolina might require suspicionless hard drive searches, installation of filtering software, preapproval to visit particular sites, or even outright bans on particular websites. But these restrictions, like the ones in *Hendricks*, would have to be individually and regularly reviewed. *Id.* at 363-64.

g. Unlike the majority of states, which have never seen the need to impose restrictions on registrants' website activities, a handful have enacted measures similar to, but still less burdensome than, Section 202.5. Many of them have come under constitutional scrutiny. For example, Louisiana has a law requiring registrants to include in their social networking profiles details such as their crime of conviction, status as a "sex offender or child predator," and residential address. La. Stat. Ann. § 15:542.1(D)(1). Nebraska had a law banning access for registrants whose underlying crime involved computers, the Internet, or a minor victim. *See Nebraska*, 898 F. Supp. 2d at 1094; *see also Doe v. Harris*, 772 F.3d 563, 579-81 (9th Cir. 2014) (enjoining California law allowing public disclosure of Internet identifiers).

That these alternatives may not "pass constitutional muster" does not preclude considering them under the *Ward* analysis. *See McCullen*, 134 S.

Ct. at 2538 n.8 ("We do not 'give [our] approval' to this or any of the other alternatives we discuss." (alteration in original)). The fact that significantly less restrictive alternatives are *themselves* constitutionally doubtful highlights why Section 202.5's more speech-suppressive approach cannot be characterized as narrowly tailored.

3. Section 202.5 Leaves Open No Realistic Alternative Channels.

This Court has held that a genuine time, place, or manner regulation—even one "narrowly tailored to serve a significant governmental interest"—is still invalid unless it also leaves open "ample alternative channels" in which to pursue the burdened First Amendment activities. *Ward*, 491 U.S. at 791. But Section 202.5 fails this prong because it forecloses a "means of communication that is both unique and important." *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994).

a. In *Ladue*, this Court struck down a municipal ban on lawn signs based on the inadequacy of alternative channels. 512 U.S. at 56. *Ladue* highlighted that such signs comprise an important avenue for "political, religious, [and] personal messages." *Id.* at 54. The Court recognized that lawn signs can "react to a local happening or express a view on a controversial issue," both of which "reflect and animate change in the life of a community." *Id.* And the medium Ladue's ordinance foreclosed was one that historically has afforded citizens an "unusually cheap and convenient" means of expression. *Id.* at 57.

Today, everything that could happen on the lawns of Ladue can also happen online. As explained above, social networking websites play an extraordinarily "important part in political campaigns." 512 U.S. at 55; *see supra* 20-21. No medium of expression is as "cheap and convenient" as the ones at issue in this case. A 140-character tweet or a 10-second "snap," like a yard sign, "may not afford . . . opportunities for conveying complex ideas." 512 U.S. at 55. But as petitioner's case demonstrates, they undoubtedly permit users to post religious and personal messages, and "react to a local happening." Sometimes, they "animate change" on a global scale. *See Nebraska*, 898 F. Supp. 2d at 1117-18 (discussing Twitter's role in the 2011 Arab Spring). But even someone interested in the "life of [the] community" of Ladue, Missouri, might now turn to a Facebook page. *See Ladue, Missouri*, Facebook, http://bit.ly/2hjEB5F.

b. It is increasingly the case that important First Amendment activity occurs exclusively over the websites Section 202.5 makes a felony for registrants to access. There are truly no alternatives. President Obama convened a "town hall" about jobs and the economy where citizens could ask questions only by tweeting at the official White House account. Katelyn Sabochik, *President Obama @ Twitter Townhall*, White House (July 7, 2011), http://bit.ly/2h942Hh. There was no other way to participate. In the aftermath of natural disasters and terror attacks, Facebook's algorithms automatically trigger "Safety Check," a service that allows users in the crisis zone to notify all their family and friends at once: "I'm Safe." Cade Metz, *How Facebook Is Transforming Disaster Response*, WIRED (Nov. 10, 2016),

http://bit.ly/2fA7NSu. The Khan Academy offers college-level academic instruction free of charge to "anyone anywhere," exclusively over its YouTube channel. Michael Noer, *One Man, One Computer, 10 Million Students: How Khan Academy Is Reinventing Education*, Forbes (Nov. 2, 2012), http://bit.ly/2hnda8B. And PBS now airs mini-documentaries "exclusively on the NowThis channel" on Snapchat. Todd Spangler, *First Snapchat-Native Documentary Films to Launch from PBS Series POV*, Variety (Oct. 20, 2016), http://bit.ly/2e5S4KX.

c. The North Carolina Supreme Court's effort to describe "alternatives" to the medium Section 202.5 forecloses only demonstrates how "important and distinct" social networking sites really are. *Ladue*, 512 U.S. at 55. The court suggested that some combination of services such as email, phone calls, text messages, traditional mail, and websites such as pauladeen.com and WRAL.com, would be a constitutionally adequate substitute. Pet. App. 16a-18a.

Even taken on its own terms, that suggestion misunderstands the First Amendment. A law that prohibited access to nytimes.com alone should not be upheld on the ground that some of the same "current events," Pet. App. 17a, are covered on WRAL.com. *Cf. Schneider*, 308 U.S. at 163.

That pixelated approach misses a larger point. Far from merely providing a platform for communicating discrete bits of information, what these websites offer is access to vast networks of other users, enabling interaction with friends, relatives, and groups of fellow users who share common interests or affiliations. Social networking

sites are unique because of the people who join them, the sheer number of users, the staggering diversity of information and opinion located at the edges of the network, and the First Amendment activities they enable.

d. The North Carolina Supreme Court concluded that Section 202.5's saving grace was that it did not ban access to the entire Internet. Pet. App. 15a-16a. Yet from the beginning, Section 202.5 has swept in many sites the average Internet user would not describe as "social networking" websites. *See supra* 10. And every day, formerly "static" websites incorporate features enabling social interaction among users, thereby placing them within the statute's criminal prohibition. Increasingly, social functionality is "embedded in commonly used technological platforms and products and in day-to-day activities related to work, community life, and entertainment." Andrew J. Harris, *Regulating Sex Offenders in the Web 2.0 Era, Part II*, 13 Sex Offender L. Rep. 81, 94 (2012). To the extent that the statutory status of other websites is in doubt, *see supra* 46 n.7, those sites cannot fairly be counted as "alternatives" Section 202.5 has "le[ft] open."

4. Section 202.5 Does Not Directly or Effectively Further the State's Interest.

For all the burdens Section 202.5 places on First Amendment activity, the statute does not further the State's important interest in a "direct and effective way." *Ward*, 491 U.S. at 800.

a. North Carolina cannot carry its burden of showing that Section 202.5 "will in fact alleviate" the

harms against which it is directed "to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Despite the State's emphasis on the problem of stealth "information-gathering" and the need for preventative measures, Section 202.5 is, by design and in effect, unlikely to substantially address the harm. A study of arrests of "online predators" conducted by the University of New Hampshire Crimes Against Children Research Center and supported by the U.S. Department of Justice, determined that 96% of those arrested for solicitation of a minor online were *not* on their state's registry. Janice Wolak et al., Univ. N.H. Crimes Against Child. Res. Ctr., *Trends in Arrests of "Online Predators"* 2 (2009).

Indeed, the only prophylaxis Section 202.5 offers is the deterrent effect that any criminal punishment provides. It stands to reason that those who truly seek to abuse website access for nefarious "harvesting" will take care to refrain from posting publicly. And the only way police officers are able to detect "access" is by doing what the arresting officer did in this case—logging into a personal Facebook account and scanning that website as any other user would to see who is actively posting.

b. Section 202.5's "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011).

The General Assembly exempted single-purpose sites that provide chat room, instant messaging, or photo sharing capabilities. *See* N.C. Gen. Stat. § 14-202.5(c)(1). But chat rooms have long been recognized

as being at the center of online predation. *See* Steven Reinberg, *Social Networking Sites Safer than IM or Chat Rooms*, Wash. Post (Feb. 1, 2008), http://wapo.st/2gb5ghb; *see, e.g.*, *State v. Fraley*, 688 S.E.2d 778, 780-81 (N.C. Ct. App. 2010) (one of many convictions in North Carolina involving illicit chat room activity). Exempting photo-sharing sites is equally strange. North Carolina allows registrants convicted of child pornography offenses to access these sites, notwithstanding their usefulness for circulating such material. *See Holm*, 326 F.3d at 873-74; *Zinn*, 321 F.3d at 1086. And the State has never explained why the crime of access should depend on how or whether the operator "derives revenue," N.C. Gen. Stat. § 14-202.5(b)(1). *Cf. Discovery Network, Inc.*, 507 U.S. at 425-26.

c. The sites that the General Assembly does target are ones that experts who study online exploitation have found raise the least concern, while those which pose serious risk to minors fall outside Section 202.5's definition.

These experts emphasize that social networking website operators "have taken many proactive steps" to prevent their sites from being used by those who seek to do harm to minors. Harris, *supra*, at 92. These operators provide mechanisms for reporting suspicious or unwelcome contact and processes "that flag suspicious interactions among users based on algorithms developed via actual transcripts of interactions that involved substantiated online solicitation." *Id.* 92-93. Not to mention that every click and scroll on these sites "leaves an indelible trail of evidence." *Id.* 93.

The very features that place websites within Section 202.5's ambit—like creation of an "online identity"—also make them "inhospitable environment[s] for would-be offenders." Harris, *supra*, at 93. By contrast, sites that permit anonymous chat activity and do not require an account or any personal information, such as Chatroulette, pose far greater danger. *Id.* "[W]ithin seconds of entering these sites, users can be engaged in text discussions or video chats with complete strangers with no login needed" and, therefore, no trail of evidence. *Id.* Those sites, experts emphasize, "appeal directly to adolescents' natural inclination toward risk-taking behavior." *Id.* For the "motivated offender," an anonymous chat site is more attractive than a social networking one, "where the risks of detection are much greater" and users interact overwhelmingly with people they already know. *Id.*

d. Finally, the State suggested—in an attempt to downplay the breadth of Section 202.5 at the certiorari stage—that a registrant would not violate the statute by "hav[ing] a friend post a message on Facebook" on his behalf. BIO 35. If that is what the law means, petitioner now stands convicted for the crime of not having a *friend* post "God is Good!" in his name. And a registrant intent on "harvesting information" about teenage account holders for nefarious purposes would be home free if he is able to persuade a non-registrant friend to access the website and print out the material for him.

IV. This Court Must Reverse Petitioner's Conviction and Strike Down Section 202.5.

At a bare minimum, Section 202.5 may not constitutionally be applied to petitioner. For all the reasons stated above, petitioner's conviction does not survive any plausibly applicable First Amendment test. But Section 202.5 is also unconstitutional on its face: it cannot survive either a "typical facial attack" or an overbreadth challenge, *United States v. Stevens*, 559 U.S. 460, 472-73 (2010).

1. There is no circumstance under which Section 202.5 could support a valid criminal conviction. *See Stevens*, 559 U.S. at 472 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). By criminalizing access without requiring any proof of wrongful intent or actual harm, the law may fairly be said to have *no* legitimate sweep. "The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise." *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984).

The government could not prosecute a burglar for violating a law banning door-to-door solicitation, even if his modus operandi was to pose as a solicitor. *See Martin v. City of Struthers*, 319 U.S. 141, 144 (1943). Nor may the government convict a person under a blanket ban on possessing virtual child pornography, even if he used such material to solicit a minor. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002). Thus, even if Corporal Schnee arrested a registrant who, unlike petitioner, accessed a social networking website to gather information with the

intent to initiate contact with a minor, a prosecution for mere "access" would still be unconstitutional.

2. Section 202.5 is facially unconstitutional for a second reason: It is substantially overbroad. A statute "may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). If Section 202.5 has any legitimate sweep, it is minuscule. This case implicates the concern that gave rise to this doctrine: This "broadly" written criminal statute has "such a deterrent effect on free expression that [it] should be subject to [immediate] challenge." *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984).

Section 202.5 is far broader than the criminal prohibitions pronounced "alarming[ly]" broad in *Stevens*. 559 U.S. at 474. All that the statute in that case prohibited were "depiction[s] of animal cruelty" that independently violated federal or state law and had no "serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.* at 464-65.

Here, Section 202.5 directly criminalizes all lawful, innocent, and protected First Amendment activities on the proscribed websites. It is more than "substantially overbroad." It is "breathtaking[ly]" so. *Hill v. Colorado*, 530 U.S. 703, 755 (2000) (Scalia, J., dissenting).

CONCLUSION

For the foregoing reasons, the decision of the North Carolina Supreme Court should be reversed.

Respectfully submitted,

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December 15, 2016

AND
RIEFS

No. 15-1194

In the *Supreme Court of the United States*

LESTER GERARD PACKINGHAM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

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January 2017

QUESTION PRESENTED

To confront the threat sexual predators pose to children, the North Carolina Legislature enacted a statute that forbids registered sex offenders from accessing "commercial social networking Web sites" that permit minors to become members. N.C. Gen. Stat. §14-202.5. Petitioner, a registered sex offender, was convicted of violating the statute by creating and accessing a Facebook page. Facebook's terms of use expressly forbid convicted sex offenders from using the site. The question presented is:

Whether the North Carolina Supreme Court correctly held, applying intermediate scrutiny, that the prosecution of petitioner under Section 202.5 did not violate the First Amendment.

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STATEMENT

"The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982). North Carolina, like all States, makes it a crime to sexually assault or abuse a child. And, coming at the problem from a different direction, North Carolina requires convicted sex offenders to register with the State and report on changes in residence. The problem persisted, however, in part because of the special challenges posed by sexual predators' use of social networking sites on the Internet.

Sexual predators became increasingly adept at using social media to gather intimate information about minors' social lives, families, hobbies, hangouts, and the like. They then used this information to target unwitting victims, either in person or online, in the guise of familiarity or shared interests. The State Legislature enacted North Carolina General Statute §14-202.5 ("Section 202.5") in response. It prevents registered sexual offenders—who are "much more likely than any other type of offender to be rearrested for a new rape or sex assault," *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (internal quotation marks omitted)—from accessing those social networking websites.

Section 202.5 comports with the First Amendment. It is content neutral, regulating only convicted individuals' *access* to a particular place irrespective of what they would say there. It furthers an undis-

putedly compelling government interest. Other proposed approaches to addressing sex offenders' use of social media would be less effective. And sex offenders have myriad alternative channels of communication. This Court should reject petitioner's challenge to the law.

A. Statutory Background.

In 1995, the North Carolina Legislature enacted North Carolina's "Sex Offender Registration Program" in an effort to protect minors from sexual predators. *See* N.C. Sess. Laws 1995-545; N.C. Gen. Stat. §14-208.5 *et seq.* The legislation detailed its purpose, specifically noting "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment" and that "persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State." N.C. Gen. Stat. §14-208.5. The legislation stated that its purpose was "to assist law enforcement agencies' efforts to protect communities" from such offenses. *Id.*

North Carolina's sex offender registry applies to sex offenders who have committed crimes against minors and those who have committed "sexually violent offenses." The registerable offenses in the latter category are:

- First degree rape;
- Second degree rape;

- First degree forcible sexual offense ("engag[ing] in a sexual act against another person by force" with additional aggravating factors);
- Second degree forcible sexual offense ("engag[ing] in a sexual act against another person by force" or with a person who is mentally disabled, mentally incapacitated, or physically helpless);
- Sexual battery ("engag[ing] in sexual contact with another person . . . by force" or with a person who is mentally disabled, mentally incapacitated, or physically helpless);
- Subjecting or maintaining a person for sexual servitude;
- Incest between near relatives; and
- Promoting the prostitution of or patronizing a prostitute who is a minor or mentally disabled person.

See id. §§14-208.6(4)(a), (5).[1] A registered sex offender may petition to be removed from the registry after 10 years of registration, but unless his petition is granted the sex offender must remain on the registry for 30 years. *Id.* §14-208.6A.

In 2008, in an additional effort to confront the problem of sexual predators, the General Assembly

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[1] *See also* N.C. Dep't of Justice, Law Enforcement Liaison Section, *The North Carolina Sex Offender & Public Protection Registration Programs* 4-5 (Sept. 2014). Two of the registerable offenses relate to sexual activity by school personnel with a "student" of a primary or secondary school. The vast majority of such students are, of course, minors.

enacted the statute at issue here—N.C. Gen. Stat. §14-202.5 ("Ban use of commercial social networking Web sites by sex offenders"). This legislation forbids registered sex offenders from accessing certain "commercial social networking Web sites" that minors frequent. *See id.* Through Section 202.5, North Carolina sought to address the menace of registered sex offenders seeking out new, unsuspecting victims via "cyberspace." Through this modern method, a sex offender can remain invisible on a social networking site while gaining intimate and detailed information about children who use the site. Offenders use that information to prey on them.

To convict a registered sex offender for violating Section 202.5, the State must show that the offender accessed a commercial social networking website where the offender knows the site permits minor children to become members or to create personal web pages on the site. *Id.* §14-202.5(a). The State further must establish that the site possesses the following attributes:

— It is a private, commercial, revenue-producing site. *Id.* §14-202.5(b)(1).

— It is a "social networking site" that allows for the social introduction between people. *Id.* §14-202.5(b)(2).

— It is a site that allows users to create pages or profiles that are capable of containing the user's name or nickname, photographs, other personal information, and links to other personal

web pages on the site belonging to friends or associates. *Id.* §14-202.5(b)(3).

— It is a site that provides its users at least one mechanism to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger. *Id.* §14-202.5(b)(4).

Access to any websites that do not meet *all* of these criteria is not restricted under the statute. *See id.* §14-202.5(b). In addition, North Carolina's statute exempts from its reach any site that "[p]rovides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." *Id.* §14-202.5(c)(1). The statute also does not apply to a site that "has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors." *Id.* §14-202.5(c)(2).

B. Facts.

On May 20, 2002, a Grand Jury in Cabarrus County, North Carolina indicted petitioner, then 21 years old, on two counts of statutory rape of a 13-year-old child. *See* Cabarrus County File Nos. 02 CRS 8475 and 02 CRS 8476. Pursuant to a plea bargain, petitioner entered a plea of guilty to taking indecent liberties with a child. *See* Cabarrus County Super. Ct., Judgment, No. 02CRS008475 (Sept. 16,

2002). Upon petitioner's conviction, he was ordered to register as a sex offender. R. 72.[2]

Petitioner posted a message on Facebook on April 27, 2010, praising God in the wake of dismissal of a traffic citation. Tr. 134-35. He knew this violated Section 202.5, J.A. 138-40, but thought the law is "ridiculous" as applied to him since he is "not a pedophile."[3] Petitioner's posting also breached Facebook's terms of service, which provide that "[y]ou will not use Facebook if you are a convicted sex offender."[4]

In April 2010, Corporal Brian Schnee, a supervisor in the juvenile investigation division of the Durham, North Carolina Police Department, was working to identify registered sex offenders who were illegally accessing commercial social networking websites. Tr. 132.[5] While perusing Facebook, Officer Schnee found a user profile page that (based on the profile photo) he believed belonged to petitioner—whom Schnee had previously determined was a registered sex offender living in Durham. *Id.*

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[2] Citations to "R. __" refer to the printed Record on Appeal, filed in the North Carolina Court of Appeals.

[3] John H. Tucker, *Durham Man Challenges Law on Sex Offenders and Social Networking Sites*, Indyweek (May 29, 2013).

[4] Facebook, Terms of Service, Statement of Rights and Responsibilities, Registration and Account, item 6 (available at www.facebook. com/legal/terms).

[5] Citations to "Tr. __" refer to the transcript of the trial proceedings in Durham County, North Carolina Superior Court.

at 132-34. On the Facebook page, petitioner was using the fictitious name "J.r. Gerrard" instead of his own name. *Id.* at 133-34; R. 77.

To confirm that J.r. Gerrard was petitioner, Officer Schnee went to the Durham County Clerk of Court's office and obtained a certified copy of the traffic citation and dismissal petitioner had referred to in his posting. *Id.* at 135-36. Based on this and additional information, Officer Schnee obtained a search warrant for petitioner's residence. *Id.* at 142.

During the search, Officer Schnee found and seized a picture of petitioner which was the same picture the officer had seen on the Facebook page; and seized other items corroborating petitioner's identity as the person who had opened and used a Facebook account. *Id.* at 152, 153, 157. Officer Schnee also seized a notice of "Changes to the North Carolina Sex Offender Registration Laws," which petitioner had signed, describing the websites that Section 202.5 prohibited him from accessing. *Id.* at 155-56.

C. Lower Court Proceedings.

1. Petitioner was indicted for violating Section 202.5. At trial, he moved to dismiss on the ground that the statute violated his First Amendment right to free speech. The trial court denied the motion, Pet. App. 54a-65a, and the North Carolina Court of Appeals denied his request for interlocutory review. Following a trial, a jury convicted petitioner.

2. Petitioner appealed to the North Carolina Court of Appeals, which reversed the conviction. *Id.* at 35a-53a. The Court of Appeals ruled that Section 202.5 is a content-neutral speech regulation subject to intermediate scrutiny. And although it found "that the State has a significant interest in protecting minors from predatory behavior by sex offenders on the internet," *id.* at 46a, the court concluded that the statute is not narrowly tailored because it applies to sex offenders whose offenses involved adults and therefore might not be "a current threat to minors," *id.* at 48a.

The Court of Appeals also ruled that Section 202.5 is unconstitutionally vague. Disregarding limiting constructions proposed by the State, the court found that "the statute could be interpreted to ban registered sex offenders from accessing sites such as Google.com and Amazon.com." *Id.* at 51a. In its vagueness analysis, the court did not address whether petitioner's conduct—accessing Facebook—was clearly proscribed.

3. The North Carolina Supreme Court reversed, holding that Section 202.5 does not violate the First Amendment or the Due Process Clause. *Id.* at 1a-27a. The court stated that, although social networking websites provide both a forum for gathering information and a means of communication, the essential purpose of Section 202.5 is to limit sex offenders' conduct, namely, "access[ing] certain carefully-defined Web sites." *Id.* at 9a. After finding that the statute is content neutral, the court con-

cluded that it should be assessed under the four-part intermediate-scrutiny test set out in *United States v. O'Brien*, 391 U.S. 367 (1968). *Id.* at 12a.

The court noted that the parties agreed that the statute satisfied the first two factors of the *O'Brien* test: whether the statute is within the government's constitutional powers and whether it furthers a substantial government interest. The court next ruled that the statute satisfies the third *O'Brien* factor, which asks whether the government interest is unrelated to the suppression of free expression. The court found that the statute's purpose is to "protect[ ] children from convicted sex offenders who could harvest information to facilitate contact with potential victims," an interest "unrelated to the suppression of free speech." *Id.* at 13a-14a.

The court then focused on the fourth *O'Brien* factor, which the court found to be the same as the test set forth in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989): whether the statute is narrowly tailored and leaves open "ample alternative channels for communication." Applying that test, the North Carolina Supreme Court concluded that Section 202.5 is narrowly tailored. The court observed that the statute contains specific exceptions for websites that provide discrete e-mail, chat room, photo-sharing, and instant messaging services. And it found that, even assuming petitioner's broad reading of the statute, it "leave[s] open ample alternative channels for communication." *Id.* at 16a (quoting *Ward*, 491 U.S. at 791). The court pointed to the

types of sites expressly excluded by the statute and the myriad other sites that do not fall within its terms. The court further noted that non-web-based methods of communication such as text messaging, FaceTime, and electronic mail remain open to petitioner.

After distinguishing the statutes struck down in a few other jurisdictions, *id.* at 18a-19a, the North Carolina Supreme Court rejected petitioner's as-applied, overbreadth, and vagueness challenges. As to overbreadth, the court found that "the statute is drafted carefully to limit its reach by establishing four criteria that must be met before access to a commercial social networking Web site is prohibited" —factors which "ensure that registered sex offenders are prohibited from accessing only those Web sites where they could actually gather information about minors to target." *Id.* at 25a. As to vagueness, the court held that such a challenge "cannot be raised by a defendant"—such as petitioner—"whose conduct falls squarely within the scope of the statute." *Id.* at 27a.

SUMMARY OF ARGUMENT

Section 202.5 does not violate the First Amendment. The law is a content-neutral time, place, or manner regulation subject to intermediate scrutiny, and it survives such scrutiny because it is narrowly tailored to serve the government's surpassingly important interest in protecting minors from sexual abuse.

I. Section 202.5 is content neutral. The statute does not target speech based upon the topics addressed or messages expressed. Rather, it is a crime-prevention measure that bars registered sex offenders from *accessing* social networking sites, regardless of what they wish to do there. That Section 202.5 applies only to a subset of speakers is a virtue, not a vice. The statute applies to registered sex offenders not because of any content preference on the State's part, but because sex offenders are far more likely than others to abuse children. Section 202.5 falls within the nation's long tradition of imposing civil disabilities on persons convicted of crimes based on the increased likelihood they will commit future crimes.

This Court regularly has treated laws that regulate *where* speech may take place as time, place, and manner restrictions subject to intermediate scrutiny. Contrary to petitioner's claims, a government may adopt a time, place, and manner restriction not only to solve administrative problems such as managing incompatible uses of public property, but also to further interests as varied as protecting residential privacy, promoting local aesthetics, and, as here, preventing crime. Petitioner is also wrong in asserting that "preventative" measures may not receive intermediate scrutiny. This Court has applied intermediate scrutiny to, for example, buffer zones and zoning laws designed to prevent problems before they occur.

II. Section 202.5 satisfies this Court's intermediate scrutiny test. Correctly interpreted, Section 202.5 bars registered sex offenders from accessing only true social networking sites that allow users to create personal pages *and* link to other personal pages of their friends or associates—*i.e.*, sites where sex offenders could actually gather information about minors—not from accessing sites such as nytimes.com. In fact, there is not a single real-world example of any registered sex offender who has been convicted under Section 202.5 for accessing a non-social-networking site. Under this correct interpretation of the statute, the law is narrowly tailored to serve the State's substantial government interest in protecting minors, and leaves open ample alternative channels for communication.

There is no doubt, and petitioner does not dispute, that North Carolina has a substantial interest in protecting children from the heinous crime of sexual abuse. Section 202.5 directly furthers that interest. Existing laws had proved inadequate; sexual predators were increasingly using social networking sites as a tool for targeting children; and registered sex offenders are far more likely than members of the general public to sexually abuse a minor. Barring that group from using social media to surreptitiously harvest information about potential victims is a valuable and sensible means of combatting the problem.

Section 202.5 need not be the least restrictive means of furthering the State's objective; it need

only promote the State's interest in a way that would be achieved less effectively absent the regulation. It does. First, Section 202.5 is not overbroad. The law applies to registered sex offenders who have been convicted of crimes against adults because a significant percentage of such offenders seek vulnerable victims regardless of age. Nor is it overbroad because it is preventative. This Court has upheld preventative laws when more direct criminal prohibitions were not effective.

Second, none of the hypothetical alternatives proposed by petitioner would be nearly as effective. Some simply repeat laws and practices already in operation in 2008 when North Carolina enacted Section 202.5. Some can be enforced only after predators have harvested information online and sexually abused a child. For example, a law that prohibited only using a social networking website to harvest information for an improper purpose could only be enforced after the abuse had taken place. And others—such as a law requiring parental permission before children can use social media—may not be constitutional and would be of dubious value. There is simply no alternative to Section 202.5 that would be both administrable and as effective.

Section 202.5 also leaves open ample alternative means for communication on the Internet. Because Section 202.5 includes only true social networking sites that meet all of its statutory criteria, it leaves open vast other options on the Internet, including adult-only social networking sites, non-

commercial social networking sites, social networking sites with limited features, government sites, commercial sites like eBay, Yelp, and Amazon.com, and countless non-social-networking sites like nytimes.com. Section 202.5 thus survives intermediate scrutiny.

III. Petitioner's claim fails whether cast as an as-applied or a facial challenge. As to the former: Petitioner was convicted for accessing Facebook, a site to which the ban plainly applies and which bars sex offenders. Section 202.5 thus did not deprive him of access to any forum in which he otherwise would have been entitled to speak or listen. To the extent petitioner is raising an argument on behalf of other sex offenders under the doctrine of overbreadth, this argument also fails. No showing has been made that any of the statute's applications would be unconstitutional, let alone a "substantial amount" of the them as required for a successful overbreadth claim.

ARGUMENT

Few crimes are as damaging and tragic as the sexual predation of children. States have diligently tried to eradicate these crimes over the years, but have met with only limited success. Among the problems facing State law enforcement are staggeringly low reporting rates and the inherent difficulty of catching perpetrators who are strangers. The North Carolina Legislature concluded that, if these crimes were not being effectively deterred, the predators had to be stopped before they began their attacks. Section 202.5 aims to accomplish that by

making it harder for registered sex offenders—who have a notoriously high recidivism rate—to harvest intimate information about their intended victims.

Section 202.5 does not bar registered sex offenders from saying anything. It instead prevents them from accessing a particular forum, one that studies (and experience) confirm is a regular and effective tool of predation. The statute, therefore, is a content-neutral restriction on the time, place, or manner of protected speech. Such laws are constitutional if "they are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791 (internal quotation marks omitted). Section 202.5 meets that test.

I. Section 202.5 is a Content-Neutral Time, Place, or Manner Regulation Subject to Intermediate Scrutiny.

The key dividing line in First Amendment law is whether or not a regulation "target[s] speech based on its communicative content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Content-based laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* By contrast, the Court has "afforded the government somewhat wider leeway to regulate features of speech unrelated to its content." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

Content-neutral laws that affect speech come in many forms. As relevant here, "the government may impose [content-neutral] reasonable restrictions on the time, place, or manner of protected speech" if they are narrowly tailored to serve significant governmental interests and leave open ample alternative channels for communication. *Ward*, 491 U.S. at 791. Section 202.5 does not "target speech based on its communicative conduct"; it instead imposes a reasonable restriction on the place where certain speech may be made. The law is therefore subject to intermediate, not strict, scrutiny.

A. Section 202.5 is content neutral.

1. North Carolina's limitation on sex offenders' access to social networking websites is content neutral. As this Court recently explained, a "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. By contrast, a law is content neutral if its restrictions are "*justified* without reference to the content of the regulated speech." *Boos v. Barry*, 485 U.S. 312, 320 (1988) (plurality). "The principal inquiry," therefore, "in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791.

North Carolina adopted Section 202.5 for the same reason it adopted its sex offender registration regime—because "sex offenders often pose a high

risk of engaging in sex offenses even after being released from incarceration or commitment and . . . protection of the public from sex offenders is of paramount governmental interest." N.C. Gen. Stat. §14-208.5. In short, the law is a crime-prevention measure.

Section 202.5's operation does not turn on "the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. Whether sex offenders "violate the Act 'depends' not 'on what they say,' but simply on where they say it." *McCullen*, 134 S. Ct. at 2531 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)). Section 202.5 therefore does not deny them the "prized American privilege to speak one's mind" on particular topics. *Bridges v. California*, 314 U.S. 252, 270 (1941).

The facts of this case are illustrative. Petitioner violated Section 202.5 because he intentionally accessed Facebook "to do any of the activities or actions" one may do there. N.C. Gen. Stat. §§14-202.5, -202.5A. The specific words he later posted or read were irrelevant. Similar to the abortion-clinic buffer zone at issue in *McCullen*—which a person could have violated "merely by standing in a buffer zone, without displaying a sign or uttering a word"—the content of the communications did not matter. 134 S. Ct. at 2531.

2. Without disputing any of this, petitioner nonetheless contends that Section 202.5 is content based because it targets "a subset of speakers." Pet'r Br. 40. But "[s]o long as" distinctions between speak-

ers "are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994). Petitioner does not contend that Section 202.5 "is a subtle means of exercising a content preference," and for good reason—it is not.

North Carolina limited Section 202.5's coverage to registered sex offenders because they are the persons most likely to use social networking sites as a prelude to sexual predation. *See* §II(B), *infra*. The State did not select them because of the political, religious, cultural, or other views they might have or wish to express on social media. The same cannot be said of the laws at issue in the cases cited by petitioner (Pet'r Br. 40-41). The governments crafted those laws specifically to favor (or disfavor) speech with particular communicative content. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999) (law prohibiting advertising of lotteries and casino gambling); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (ordinance barring only commercial publications from using "free-standing newsracks"); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (ordinance barring all picketing—except "peaceful labor picketing"—next to a school).

Indeed, petitioner has it exactly backwards. That Section 202.5 applies only to convicted sex offenders *supports* subjecting it to intermediate scrutiny. This nation has a long tradition of impos-

ing civil disabilities on persons convicted of crimes even after they completed their criminal sentences. Such persons, as a class, have been barred from keeping and bearing arms, *see District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), from voting, *see Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), from serving on a jury, *see* 28 U.S.C. §1865(b)(5), and from holding public office, *see Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985). They have also been barred from enlisting in the military, *see* 10 U.S.C. §504(a), from receiving a security clearance, *see* 10 U.S.C. §§504, 986(c)(1), and from entering certain professions, *see North Carolina v. Rice*, 404 U.S. 244, 247 n.1 (1971).

Sex offenders, in particular, have been subjected to a variety of registration, reporting, and residency restrictions, that could not have been imposed on the public at large. *See Kennedy v. Louisiana*, 554 U.S. 407, 455-58 & nn.2-5 (2008) (Alito, J., dissenting) (listing federal and state laws). Governments have imposed, and courts have upheld, these laws based on the predictive judgment that sex offenders are far more likely to commit future crimes than other citizens. *See Smith v. Doe*, 538 U.S. 84, 103 (2003) (upholding sex offender registration and notification law); *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016) (upholding residency requirement).

This does not mean, of course, that States may without cause deprive convicted persons of all their First Amendment rights. It does mean that States

and the federal government have greater leeway when dealing with this class of individuals than when dealing with the general public.

B. Section 202.5 is a time, place, or manner regulation.

1. Section 202.5 bars registered sex offenders from accessing particular (virtual) locations. Rather than regulating the *content* of speech, the law regulates the *place* where speech may be made. It is therefore a classic time, place, or manner law. This Court has regularly analyzed laws that bar access to specific locations where speech would otherwise take place as time, place, or manner laws. *See, e.g.*, *McCullen*, 134 S. Ct. 2518 (law creating 35-foot buffer zone around abortion facilities); *Frisby v. Schultz*, 487 U.S. 474 (1988) (law banning picketing around residences); *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640 (1981) (law limiting location at which religious literature could be distributed at a state fair).[6]

2. Petitioner resists that conclusion based on his idiosyncratic view that the only true time, place, or manner regulations address "administration"

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[6] Although the North Carolina Supreme Court concluded that Section 202.5 regulates conduct, that conclusion makes no difference to the analysis here because, as explained in the Brief in Opposition (at 21-22), the *O'Brien* test that applies to regulations of conduct that incidentally affect speech "'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" *Ward*, 491 U.S. at 798 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984)).

problems, such as the fact that "'[t]wo parades cannot march on the same street simultaneously.'" Pet'r Br. 38 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972)). Not so. While some "time, place, or manner" cases involved competing parades or potential traffic disruptions, in others the government interest had nothing to do with incompatible uses of public property.

For example, in *Frisby* the Court held that a local "ordinance that completely bans picketing 'before or about' any residence" was a time, place, or manner regulation. 487 U.S. at 484. Finding that it furthered the city's interest in "the protection of residential privacy," the Court upheld the provision. *Id.* And in *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994), the Court treated a ban on signs on private homes—enacted for aesthetic reasons—as a time, place, and manner regulation (though it concluded the ban failed intermediate scrutiny). *See also Los Angeles v. Taxpayers v. Vincent*, 466 U.S. 789, 809 (1984) (applying intermediate scrutiny to law enacted to "eliminat[e] visual clutter").

In addition, the Court has subjected to intermediate scrutiny time, place, or manner laws designed to "control noise levels," *Ward*, 491 U.S. at 792; laws designed to prevent a "threat to . . . security or peace," *Boos*, 485 U.S. at 330; and laws "designed to prevent crime," *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

3. Nor is petitioner correct that Section 202.5 is not a time, place, or manner regulation because of its

"global . . . scope" and the large number of people who use some of the affected websites. Pet'r Br. 37. Section 202.5's scope matters when *applying* intermediate scrutiny. It does not control whether the law is a time, place, or manner regulation *subject to* intermediate scrutiny.

4. Petitioner lastly insists that Section 202.5 merits strict (indeed, fatal) scrutiny, not intermediate scrutiny, because it is a "preventative measure[]." Pet'r Br. 29. That contention lacks merit.

This Court has applied intermediate scrutiny to many "preventative" laws. Buffer zones around abortion clinics are one example. Although the Court in *McCullen* was deeply divided over whether the state law was content-neutral, no Justice disagreed that a content-neutral buffer zone constitutes a time, place, or manner law. And that is so even though such buffer zones are designed to "ensur[e] public safety outside abortion clinics [and] prevent[] harassment and intimidation of patients and clinic staff"—all of which could have been directly proscribed. 134 S. Ct. at 2537; *see also Hill v. Colorado*, 530 U.S. 703, 724 (2000).

This Court's secondary effects cases likewise subject "preventative" measures to intermediate scrutiny. In *Renton*, the Court applied intermediate scrutiny to, and upheld, a law that banned adult theaters from locating within 1,000 feet of residential areas. 475 U.S. at 46-49. The Court did so even though the law was preventative in nature; it tried to stop crime indirectly through zoning measures

rather than through new criminal laws or greater enforcement of criminal laws already on the books. *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (plurality) (applying intermediate scrutiny to ordinance "aimed at combating crime").[7]

The cases upon which petitioner relies, Pet'r Br. 30-34, are readily distinguishable. He focuses mainly on the series of cases establishing the "clear and present danger rule," which later became the "imminent lawless action" rule announced in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*). In those cases, however, the government acted based on the content of the speech—for example, the encouragement of communism and the overthrow of our government. The cases prove only that *content-based* laws are presumptively invalid, even if they are justified as preventative measures; they tell us nothing about how to assess *content-neutral* laws justified as crime-prevention measures.

Likewise, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which petitioner relies on at length, Pet'r Br. 31-34, involved a content-based law. *Free Speech Coalition* invalidated a federal statute prohibiting the possession and distribution of "virtual child pornography"—a category of speech protected, the Court held, by the First Amendment. There is a world of difference between banning a category of

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[7] As discussed in §II(C)(1), *infra*, the Court has upheld several preventative content-*based* measures, concluding that they were necessary to accomplish the government's compelling interests. *See Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *Burson v. Freeman*, 504 U.S. 91 (1992).

protected speech (be it non-obscene pornography, videos depicting cruelty to animals, or violent video-games) and regulating the time, place, or manner of protected speech. *Free Speech Coalition* involved the former; this case involves the latter.

Nor, finally, does *Martin v. City of Struthers*, 319 U.S. 141 (1943) (invalidating statute prohibiting all door-to-door distribution of "handbills, circulars or other advertisements"), hold to the contrary. To be sure, as petitioner notes, Pet'r Br. 30, *Martin* rejected the city's rationale that "burglars frequently pose as canvassers." *Id.* at 144. But whereas the law in *Martin* proscribed *all* canvassing by *all* persons based on the speculation that some burglars use canvassing as a device for planning or carrying out their crimes, Section 202.5 is far different. It does not prohibit all use of the Internet by all persons; it bans access to a few sites by a small percentage of the population. Simply put, *Martin* involved a plainly overbroad statute that altogether eliminated a traditional form of communication. It hardly stands for the proposition that the First Amendment bars any and all laws designed to prevent crimes by making it harder for potential criminals to commit them.

In the end, as with his "global scope" argument, petitioner takes an argument for why Section 202.5 supposedly does not satisfy intermediate scrutiny and wrongly uses it as an argument for why the law is not subject to intermediate scrutiny in the first place. But whether the law is narrowly tailored does

not determine the nature of the narrow-tailoring inquiry itself. For the reasons set forth above, the intermediate-scrutiny narrow-tailoring test set out in *Ward* applies.

II. Section 202.5 Satisfies Intermediate Scrutiny.

Content-neutral time, place, or manner laws are valid if "they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791. As petitioner concedes, the government does not have to prove the law is the "least restrictive or least intrusive means" of achieving the government's interest. *Id.* at 798. Instead, "the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799. Put another way, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800. Section 202.5 satisfies that test. Having found that other, more direct, methods of combatting sexual violence against children failed, North Carolina tried a new method—preventing the most likely offenders from accessing personal information about children which they could then use to commit the offense. Other approaches proposed by

petitioner have already been tried and failed or would manifestly be less effective. And registered sex offenders have ample alternative ways by which they can communicate or receive any messages they wish, to whomever they wish. To understand why, it is necessary as an initial matter to explain Section 202.5's scope.

A. Section 202.5 prohibits access only to true social networking sites such as Facebook, not sites such as nytimes.com.

Petitioner's contention that Section 202.5 sweeps too broadly, and bars access to more speech than is needed to further the State's interest, rests in part on his misreading of the law's scope. Although he no longer contends that the statute is unconstitutionally vague, he still maintains that it sweeps in non-social-networking sites such as nytimes.com. *See, e.g.*, Pet'r Br. 8, 22, 46, 57. It does not. It bars registered sex offenders from accessing only sites that (unlike nytimes.com) contain the hallmark of social networking media—the ability to link to the personal pages of other "friends" on the same site.

The starting point, of course, is "the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). To meet the definition of "social networking site" under Section 202.5(b), the site must allow the user to include *all* the information listed in subsection (b)(3), which includes the ability to link to other users' pages. *See* N.C. Gen. Stat.

§202.5(b)(3) ("Allows users to create Web pages or personal profiles that contain information such as the name and nickname of the user, . . . other personal information about the user, *and* links to other personal Web pages on the commercial social networking site of friends or associates of the user that may be accessed by other users or visitors to the Web site" (emphasis added)). The site must also meet the requirements of subsection (b)(4), which requires that users be able "to communicate with other users" by "a message board, chat room, electronic mail, *or* instant messenger" (emphasis added).

Sites such as nytimes.com, Google.com, and Amazon.com are therefore not covered because they do not allow for the creation of personal user pages that link to other users' personal pages while also providing a message board, chat room, email, or instant messaging platform. This construction of Section 202.5 accomplishes its undisputed purpose: to prevent registered sex offenders from accessing information about minors by viewing a personal page containing identifying information about the creator of the page, and which can link to other such pages on the site. And it accords with common sense: "[A]s a matter of natural meaning, an educated user of English would not describe" sites such as

nytimes.com or Amazon.com as social networking sites. *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014).[8]

This interpretation of the statute is supported by the constitutional doubt doctrine. "It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). This Court will seek "an interpretation which supports the constitutionality of legislation." *Parker v. Levy*, 417 U.S. 733, 756 (1974). Section 202.5 is readily susceptible to a narrow interpretation that limits its coverage to those sites that allow users to link to other users' pages.

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[8] Nor is petitioner correct in asserting, Pet'r Br. 23, that "access" to Facebook is complete when "a person arrives at an innocuous landing page." The dictionary definition of "access" as "[t]he act of approaching" contains a clarification as to computer access: "**Usage Note**: the verb *access* is well established in its computational sense 'to obtain access to (data or processes).'" American Heritage Dictionary 8 (3d ed. 1997). This comports with the definition the North Carolina legislature gave "access" in the provision following and cross-referencing Section 202.5:

> For the purposes of this section, "access" is defined as allowing the sex offender to do any of the activities or actions described in G.S. 14-202.5(b)(2) through G.S. 14-202.5(b)(4) by utilizing the Web site.

N.C. Gen. Stat. §14-202.5A. "Access" to Facebook's data and processes does not occur simply by landing on Facebook's log-in page.

Petitioner and his amici are wrong when they suggest that the North Carolina Supreme Court rejected the State's interpretation and adopted his. Pet'r Br. 46; Cato Br. 10; Reporters Committee Br. 5. The court expressly noted that the many statutory criteria a site must meet to be banned "ensure that registered sex offenders are prohibited from accessing *only* those Web sites where they could *actually gather information about minors* to target." Pet. App. 15a (emphasis added). "Outside these limits, registered sex offenders are free to use the Internet." *Id.*

And although the North Carolina Supreme Court did not definitively reject petitioner's list of "numerous well-known Web sites" he thought he could not access, neither did the court approve it. Rather, the court found "that even where defendant is correct, the Web offers numerous alternatives that provide the same or similar services that defendant could access without violating N.C.G.S. §14-202.5." Pet. App. 16a-17a. We are therefore left without definitive state court guidance on the issue, but with the strong suggestion that it encompasses only true social networking sites, as colloquially understood.

Section 202.5's prosecution history does not show otherwise. Petitioner relies upon statistics garnered from a small independent newspaper in proclaiming that the law has been used to prosecute more than 1000 people since its enactment. But he has produced not even *one* real-world case in which the State of North Carolina pursued charges for a sexual offender's access of nytimes.com,

Amazon.com, or some other non-social-networking site. The State agreed to dismiss the case in the much-cited example of an offender who was charged for using Skype,[9] which plainly does not fall under the statute because it does not allow for the creation of personal user pages that link to others' personal pages while also providing a message board, chat room, email, or instant messaging platform.

B. Section 202.5 furthers a significant government interest.

To be narrowly tailored, a time, place, or manner regulation must, first, "promote[] a substantial government interest." *Ward*, 491 U.S. at 799. Section 202.5 promotes the compelling government interest in protecting children from sexual predators.

1. This Court has specifically held that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber*, 458 U.S. at 757. After all, "[t]he sexual abuse of children is heinous beyond words," *Eze v. Senkowski*, 321 F.3d 110, 112 (2d Cir. 2003), and the psychological effects of the crime often haunt victimized children for the rest of their lives. As this Court has recognized, for example, "sexually exploited children" may be "unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults." *Ferber*, 458 U.S. at 758 n.9. Thus, "[s]ex offenders

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[9] *See State v. Dwayne H. Davis*, Halifax County Case No. 11CRS53996 (charge dismissed on October 21, 2013).

are a serious threat in this Nation," especially given that the victims of sexual assault are most often juveniles. *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (internal quotation marks omitted).

Section 202.5 is part of a national effort to address the problem. *See Kennedy*, 554 U.S. at 455-58 & nn.2-5 (Alito, J., dissenting) (discussing and listing various federal and state measures). The North Carolina sex-offender registry law recognizes "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment" and that protecting children from sex offenses "is of great governmental interest." N.C. Gen. Stat. §14-208.5. The Legislature enacted Section 202.5 to better achieve that objective.

2. When it enacted Section 202.5, North Carolina already had on the books laws making it a crime to sexually assault a child, *see* N.C. Gen. Stat. §§14-27.21 to -27.33, to attempt to do so, §14-2.5, to take indecent liberties with a child, §14-202.4, and to stalk a child, §14-277.3A. And, of course, North Carolina already had a sex offender registry. §§14-208.5 to -208.44. The crisis continued unabated. *See* My Sister's Place, *Sexual Assault Statistics*, http://www.mysisters.place/sexual-assault-statistics (stating that in 2008, when the Legislature enacted Section 202.5, North Carolina prosecutors filed more than 4200 charges for sexual crimes against

nors).[10] The Legislature therefore tried a different tack: making it more difficult for potential sex offenders to obtain information they often use to help them commit their offenses.

Section 202.5 does this by barring registered sex offenders from accessing social networking websites. The Legislature concluded that the law would further its crime-prevention objective because (1) existing methods addressing sexual abuse of children were not succeeding; (2) sexual predators commonly use social networking sites to cull information about minors; and (3) registered sex offenders are proportionately far more likely than members of the general public to sexually assault minors.

Existing efforts at addressing sexual predation of children were failing. Law enforcement has long struggled to track down and arrest child predators. Only "[t]hirty percent of juvenile sexual assaults are reported to police." David Finkelhor & Richard Ormrod, *Reporting Crimes Against Juveniles*, Juvenile Justice Bulletin 3 (DOJ Nov. 1999). And only 3.3 percent of hands-on sex offenses, such as rape or child molestation, result in an arrest. U.S. Department of Justice, *Sex*

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[10] These included 778 charges for first degree rape against a child, 1442 charges for first degree sex offenses against a child, 1861 charges for sexual exploitation of a minor, and 72 charges against school personnel for taking indecent liberties with students. Given the underreporting of sexual crimes, the true number of victims was undoubtedly much higher.

Offender Management Assessment and Planning Initiative 91 (2014) ("DOJ Sex Offender Report").[11]

Part of the problem was that "[a]rrests are less likely when the perpetrator is a stranger, which reflects the greater difficulty in locating the offender to complete an arrest." David Finkelhor et al., *The Justice System for Juveniles: A Comprehensive Model of Case Flow*, 6 Trauma, Violence & Abuse 83 (2005). Children's prevalent use of social media exacerbated the problem because sex offenders who choose their victims through social networking are often hard to identify. *See, e.g.*, Online Predators/Internet Predators (March 14, 2012), http://www.minormonitor.com/resource/online-predators/. That is especially true "if the predator never actually contacted the victim using the social networking site but instead just used it to gain a wealth of information that made the victim an easy target." *Id.*

Sexual predators commonly use social networking sites to cull information about minors. With traditional efforts failing, North Carolina focused on predators' use of the Internet because social networking had become an increasingly common tool of sexual predators. One study found that "48.5% of online child sexual exploitation reports received were linked to social network-

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[11] The Report was prepared by DOJ's Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. It is available at http://smart.gov/ SOMAPI/pdfs/SOMAPI_Full%20Report.pdf.

ing sites, of which Facebook is only one." Christopher Hope, *Facebook is a 'major location of online child sexual grooming', head of protection agency says*, The Telegraph (Oct. 15, 2013).[12] Another study showed that "in 82 percent of online sex crimes against minors, the offender used the victim's social networking site to gain information about the victim's likes and dislikes," and "in 62 percent of online sex crimes against minors, the offender used the victim's social networking site to gain home and school information about the victim." Kimberly Mitchell et al., *Use of Social Networking Sites in Online Sex Crimes Against Minors: An Examination of National Incidence and Means of Utilization*, 47 J. Adolescent Health 183, 185 (2010).

Sexual predators use social networks to set up their crimes in several ways. One is to "groom" children for sexual abuse. Grooming is a "deceptive process" in which a child victim is manipulated "through a nonsexual approach, which is designed to entice a victim into a sexual encounter." Ilene R. Berson, *Grooming Cybervictims: The Psychological Effects of Online Exploitation for Youth*, 2 Journal of School Violence 11 (2003). An "online predator is skilled at collecting information from children, searching profiles for vulnerable targets, and acquiring personal information on a specific child."

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[12] This article is available at http://www.telegraph.co.uk/technology/facebook/10380631/Facebook-is-a-major-location-for-online-child-sexual-grooming-head-of-child-protection-agency-says.html.

Id. at 12. In online grooming, a "pedophile can hide behind the protective cloak of anonymity" rather than lurk at playgrounds, youth sporting events, or children's venues where someone may become suspicious of special attention directed toward a child. *Id.*

Another approach is for predators to "use information made available on social networking sites to gather information such as where the child lives, his day to day activities and routines, who he hangs out with, etc." Online Predators/Internet Predators, http://www.minormonitor.com/resource/online-predators/. Predators are then "able to gather enough information to commit heinous crimes against children." *Id.*

Section 202.5 bars offenders from taking what is often the critical first step in the sexual assault of a child. It allows law enforcement to stop the activity before a child is actually harmed. Petitioner slights this effort, suggesting, Pet'r Br. 58, that offenders can evade the prohibition by not "posting publicly." They cannot. Because an offender accesses a website when he creates a personal user page, law enforcement can discover registered sex offenders accessing social networking sites even if the offender does not post anything. *See* N.C. Gen. Stat. §§14-202.5(b)(3), -202.5A(b). Social networking websites also can obtain online identifiers of registered sex offenders from States, check those against their members' identifiers, and report access to the proper authorities regardless of whether the offender has posted.

See N.C. Gen. Stat. §14-208.15A; Berkman Ctr. for Internet and Soc'y, *Enhancing Child Safety and Online Technologies: Final Report of the Internet Safety Technical Task Force to the Multi-State Working Group on Social Networking of State Attorneys General of the United States*, app. E, Facebook Submission 3 (2008) (stating that Facebook "works closely with law enforcement" and "check[s] new users at sign-up and review[s] existing users" against registry lists).

And petitioner denies reality when he asserts, Pet'r Br. at 59-60, that social networking sites are "inhospitable environments" for potential predators because they would have to create an "online identity" and leave "an indelible trail of evidence." Many registered sex offenders falsify their identity. It blinks reality to suggest that sexual predators do not use social media to further their crimes.

Petitioner's criticism of Section 202.5 for its supposed underinclusiveness also misses the mark. The General Assembly carefully chose to exclude from the statute's purview sites that provide solely a chat room, message board platform, email, photo-sharing, or instant messenger so as not to effectively ban a huge of number sites on the Web. And carving out such sites made ample policy sense. These chat rooms or messaging services do not allow users to access the transparent level of personal information and photographs available on social networking sites, nor can users of these sites remain invisible to others participating in the feature. A State "may

take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Buckley v. Valeo*, 424 U.S. 1, 105 (1976) (*per curiam*) (internal quotation marks omitted).

The Legislature's decision to include only sites where the operator "derives revenue" likewise made ample sense. The vast majority of sites that otherwise fit the definition of a social networking site are commercial. The State reasonably chose to tailor the statute to focus on the biggest sites, where the most predators and potential victims would be present.

Registered sex offenders are proportionately far more likely than members of the general public to sexually assault minors. The North Carolina legislature found "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment." N.C. Gen. Stat. §14-208.5. This Court, too, has recognized that convicted sex offenders "are much more likely than any other type of offender to be rearrested for a new rape or sex assault." *Conn. Dept. of Public Safety*, 538 U.S. at 4. Those "predictive judgments," which are entitled to "substantial deference," *Turner Broad. Sys., Inc.*, 520 U.S. at 195 (internal quotation marks omitted), comport with common sense and are supported by social science.

Although petitioner correctly reports that sex offenders had a lower overall re-arrest rate than non-sex offenders, their *sex-crime* arrest rate was four times higher than the rate for non-sex offend-

ers. DOJ Sex Offender Report 61-62. Moreover, that figure almost certainly understates registered sex offenders' recidivism. Researchers "widely agree that observed recidivism rates are underestimates for the true reoffense rates of sex offenders" due to the low frequency with which sex crimes are reported and the large number of sex crimes that are unsolved or not prosecuted. DOJ Sex Offender Report 89-91; *see also* National Institute of Justice, *Reporting of Sexual Violence Incidents* (2010) (finding that sexual offenses are grossly under-reported because of the shame and degradation peculiar to these crimes).[13]

One study showed that only 5 percent of rapes and child sexual assaults self-reported by offenders during treatment were reflected in official records. DOJ Sex Offender Report 91. When polygraphs were used, the number of victims reported by incarcerated sex offenders rose from the average of 2 reported in official records to an average of 18. *Id.* at 61. The average number of offenses to which sex offenders admitted committing rose from 12 to 137. *Id.*

Petitioner contends, Pet'r Br. 58, that a 2009 study showing that only 4 percent of those arrested for solicitation of a minor online were on their state's registry means there is no need for preventative measures like Section 202.5. The study, which collected information concerning online sex crimes during a twelve-month period in 2000-2001 and also during the calendar year of 2006, showed that per-

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[13] The report is available at http://www.nij.gov/topics/crime/rape-sexual-violence/Pages/rape-notification.aspx.

centage had doubled during the five-year span. Janis Wolak *et al.*, *Trends in Arrests of "Online Predators"* 1, 7-9 (Univ. of New Hampshire Crimes Against Children Research Center 2009). This change is hardly surprising as sex offender registries were in their infancy in 2001 and offenders were being added to the lists every year. There is every reason to believe the percentage is much higher more than ten years later as the number of offenders on the registries has continued to grow. *See* PRNewswire, *Number of Registered Sex Offenders in the U.S. Nears Three-quarters of a Million* (Jan. 23, 2012) (noting that in the five years between 2006 and 2011 the number of sex offenders on registries increased 23.2 percent).[14]

C. Section 202.5 does not burden substantially more speech than necessary to achieve its purpose.

A time, place, or manner regulation that promotes a substantial government interest is narrowly tailored if it "does not burden substantially more speech than necessary to achieve its purpose," *i.e.*, if that interest "would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799. Past experience, common sense, and social science confirm that alternative approaches would be less effective at promoting the State's compelling gov-

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[14] Available at http://www.prnewswire.com/news-releases/number-of-registered-sex-offenders-in-the-us-nears-three-quarters-of-a-million-137880068.html.

ernment interest in protecting children from sexual predators. The law is therefore narrowly tailored.

Second-guessing the North Carolina Legislature's judgment, petitioner claims that Section 202.5 is broader than necessary, and that less speech-restrictive measures could as effectively achieve the State's objective of protecting children from sexual predators. Neither contention is correct.

1. Section 202.5 is not overbroad.

a. Section 202.5 excludes from its purview all sites other than those through which registered sex offenders can access information about minors by viewing a personal page containing identifying information about the creator of the page, and which can link to other such pages on the site. Petitioner nonetheless faults the statute for reaching *all* registered sex offenders, including those whose prior conviction was not for sexually assaulting a minor. His criticism is misplaced.

As an initial matter, most registerable offenses pertain or can pertain to sex offenders who assaulted children. *See* N.C. Gen. Stat. §14-208.6. Petitioner wholly fails to substantiate *how many* registered offenders did not assault minors. Vague, unsupported assertions surely cannot meet the burden of showing "substantial overbreadth."

In any event, North Carolina included these offenders under the legislation for good reason. Section 202.5 protects minors who are likely to

frequent social networking sites. Minors old enough to use such sites are targeted not only by preferential offenders who seek only adolescents but also by situational sexual offenders who seek any victim who may be vulnerable. Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis* 34 (2010).

Research shows a high cross-over rate for sexual offenders, particularly for offenders who commit the types of serious sexual crimes to which North Carolina's registry statute applies. Specifically, studies show that adult-victim rapists "often sexually assault children," with the majority of studies finding "rates in the range of 50 to 60 percent." DOJ Sex Offender Report 61-62. Studies also show that "incest offenders often sexually assault children both within and outside their family," and that "64-66 percent of incest offenders report sexually assaulting children who they were not related to." *Id.* These "[i]ndiscriminate offenders, also known as mixed offenders, report sexually abusing both adults and children equivalently." *Id.* at 65. "Taken together, crossover findings suggest that traditional typologies based on victim type may not be useful to allocate resources, evaluate risk, or devise individualized treatment interventions." *Id.* at 63.

Section 202.5's inclusion of all registered sexual offenders is well-founded. The law would be far less effective in protecting minors if registered sex offenders whose past crime(s) involved adults were excluded from coverage.

b. Section 202.5 is a preventative measure that strives to stop child sex offenders *before* they commit sex offenses. Petitioner asserts that preventative measures that restrict speech are virtually per se overbroad and invalid. That is incorrect. Section I(B), *supra*, explained that preventative measures that regulate the time, place, or manner of speech are subject to intermediate review. Further, this Court has upheld preventative measures against First Amendment challenges.

For example, in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Court upheld a statute criminalizing material support to terrorists, even as applied to speech intended to "promot[e] peacable, lawful conduct." *Id.* at 30. Applying strict scrutiny, the Court concluded that such speech made terrorist "attacks more likely to occur" by indirectly "bolster[ing] the terrorist activities of the organization." *Id.* at 35, 36.

And in *Burson v. Freeman*, the Court upheld a law creating a 100-foot "campaign-free zone" around a polling place, even though it suppressed content-based political speech. 504 U.S. 191. Tennessee argued that the "campaign-free zone" was necessary to further its compelling interests in protecting the right of its citizens to vote freely and to vote in an election conducted with integrity and reliability. *Id.* at 198-99. The Court agreed, rejecting respondent's contention that the law was overinclusive "because States could secure these same compelling interests with statutes that make it a misdemeanor to inter-

fere with an election or to use violence or intimidation to prevent voting." *Id.* at 206. The Court found that such laws, which Tennessee had on the books, "fall short of serving a State's compelling interests" because they deal only with the worst acts and because many of those acts go undetected by the police. *Id.* at 208-09.

Similarly here, although North Carolina laws punish sex offenses against children, the Legislature recognized that "efforts to protect communities, conduct investigations, and quickly apprehend offenders" are not succeeding. N.C. Gen. Stat. §14-208.5. When a State is having difficulty directly enforcing a criminal law barring violent attacks, it is perfectly reasonable for the State to take measures to stop the attacks from occurring in the first place. Section 202.5 does this by cutting off a fertile source of information that predators use to facilitate child sexual abuse. *See Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976) (plurality) (government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems").

c. Preventative measures are all the more appropriate when the restrictions apply only to individuals who have proven themselves unable to abide by society's laws. As discussed in §I(A), *supra*, States and the federal government have long found it appropriate and necessary to impose civil disabilities on persons who committed crimes. The very purpose of many of those laws was to guard against the *potential* for harm by convicts, rather than to wait for the

crimes to occur. *See, e.g., Smith*, 538 U.S. at 103; *Voisine v. United States*, 136 S. Ct. 2272 (2016) (holding that persons convicted of a misdemeanor crime of domestic violence are barred from possessing firearms, even if the misdemeanor involved mere reckless conduct).

2. Other proposed methods of protecting children would be less effective.

A regulation is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *United States v. Albertini*, 472 U.S. 675, 689 (1985). The question is whether the proposed alternative would promote the government interest as effectively. None of the alternatives proposed by petitioner meets that test.

a. Petitioner proposes, Pet'r Br. 47-49, a law making it a crime to harvest information on social networking sites for the purpose of targeting children. He fails to explain, however, how such a prohibition would be administered or how it would prevent sex offenses from being perpetrated. Most perpetrators would have completed or at least attempted their abuse of victims before the harvesting could ever be discovered. An anti-harvesting law would therefore accomplish nothing more than existing laws criminalizing the sexual assaults themselves—laws whose inability to solve the problem prompted the Legislature to enact Section 202.5 in the first place.

b. Similarly, petitioner contends the Legislature could have enacted statutes distinguishing between wrongful and innocent access of social networking sites. But laws punishing specific contact with children on social networking websites or punishing entrapment of children via those websites would not prevent registered sex offenders from secretly obtaining information to use in grooming children. And until a sex offense is committed or attempted, it would be difficult to know whether information was being harvested for a proper or illicit purpose.

c. Petitioner next posits, Pet'r Br. 49-50, that the General Assembly could have specified that access of a website for a lawful purpose would not be a crime, akin to how North Carolina's "cyberstalking" law operates. *See* N.C. Gen. Stat. §14-196.3(e). The comparison is inapposite.

North Carolina's cyberstalking law contemplates communication being made via computer and provides that it "does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others." *Id.* Section 202.5, by contrast, tackles conduct—such as harvesting information about a child's habits and interests—that does not require direct communication between the predator and the victim.

d. Nor are additional law enforcement efforts, including undercover operations, an equally effective alternative. Pet'r Br. 50-51. North Carolina adopted

Section 202.5 after concluding that, even with significant law enforcement investigations, it was not making a sufficient dent on the problem. As noted above, only a small percentage of child sex offenses is reported, and only a small percentage of those reported offenses results in arrests.

Contrary to petitioner's suggestion, these problems are not readily solved because registered sex offenders already must provide to authorities "[a]ny online identifier that the person uses or intends to use." N.C. Gen. Stat. §14-208.7(b)(7). Many registered sex offenders—like petitioner—falsify their identities to access a social networking site. Center for Identity Management and Information Protection, Utica College, *Hiding in Plain Sight? A Nationwide Study of the Use of Identity Manipulation by Registered Sex Offenders* 68 (2015).[15]

Petitioner is equally off the mark in proposing that the State require website operators to ensure that teenagers have adult permission before establishing accounts and giving parents ongoing access. Even assuming such a law would be constitutional, *but see Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), any marginal reduction in the number of children on those sites would hardly stop predators from gathering information—and using

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[15] The study is available at www.utica.edu/academic/institutes/cimip/Hiding_in_Plain_Sight.pdf.

that information for grooming either online or in person—about the many children who would remain.

e. Petitioner next proposes, Pet'r Br. 51-52, that the State be content to leave it to individual judges, in their discretion when sentencing individual sex offenders to supervised release or parole, to "impose[] limited-duration conditions" on their use of computers. Of course, judges have long had, and continue to have, that power. Had it satisfactorily resolved the crisis, Section 202.5 would not have been needed.

Conditions of parole necessarily apply only as long as a sex offender is on parole. While offenders may comply with the conditions during this limited period, this does not prevent them from repeating their crimes once they no longer are on parole. And even if the use of computer monitoring software would withstand Fourth Amendment scrutiny, *see Doe v. Nebraska*, 734 F. Supp. 2d 882, 902-03 (D. Neb. 2010), it is unlikely that such monitoring would accomplish the goal of stopping child sex crimes before they occur. At best, such monitoring would merely provide evidence for use after an offense was committed.

f. Petitioner also fails to show how an individualized assessment of sex offenders to determine whether they are "sexually violent predators," as approved in *Kansas v. Hendricks*, 521 U.S. 346 (1997), would be as effective in promoting the State's interest in preventing child sex crimes. North Carolina has properly determined that all registered sex

offenders present a danger to children for the reasons set out in §II(C)(1), *supra*. Indeed, North Carolina already provides for an individualized determination of whether an offender is a "sexually violent predator" for purposes of determining the length of time an offender must remain on the registry and therefore barred from social networking websites. *See* N.C. Gen. Stat. §§14-208.20 (requiring for a presentence investigation and court determination under certain circumstances as to whether an offender is a "sexually violent predator"); -208.23 (requiring lifetime registration for a "sexually violent predator").

g. Nor, finally, are the statutes Louisiana and Nebraska adopted less-restrictive alternatives that are equally effective. *But see* Pet'r Br. 53-54. Nebraska's statute, invalidated in *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012)—unlike Section 202.5—prohibited access to "instant messaging" and "chat room service" in addition to social networking sites. Neb. Rev. Stat. §28-322.05. By encompassing media not utilized for secretly gaining information concerning children, the statute was not as narrowly tailored as Section 202.5.

Louisiana's statute bans from social media registered sex offenders who committed their crimes against minors or with a computer. To the extent the law allows registered offenders who assaulted adults and did not use a computer to use social media, it is not as effective as North Carolina's law for the reasons set out in §II(C)(1), *supra*.

* * * * *

There is no administrable and effective alternative to Section 202.5 for preventing the harvesting of information used to groom potential victims of child sex abuse. Without Section 202.5, the State's substantial interest in protecting children from sexual abuse would be achieved less effectively.

D. Section 202.5 leaves open ample alternative channels.

Properly construed to apply only to true social networking sites, Section 202.5 leaves open ample "alternative channels of communication." A sex offender may access any site on the Internet that does not fall under the definition of "commercial social networking sites" or that does not allow members under the age of 18. This includes social networking sites for adults only, social networking sites with limited features, non-commercial social networking sites, and government sites. He can navigate to and post on popular sites like Slate.com, DrudgeReport.com, and Politico.com. He can go to commercial sites like eBay, Yelp, and Amazon.com.

A sex offender can also create his own web page, blogs, and podcasts, and visit those of others. He can visit websites that provide solely a chat room, message board platform, email, photo-sharing, or instant messenger. He may take out advertisements on any site on the Internet, and use mail exploders to send his messages, and, yes—he may even have a friend post a message on Facebook and directly attribute the message to him. He could, as petitioner mock-

ingly suggests, Pet'r Br. 60, have a friend print out a photo off of Facebook for him. But even if it were a photo of the entire middle school cheerleading squad, the registered sex offender would not be able to navigate from this photo to find out the cheerleaders' individual interests or vulnerabilities.

The specific activities petitioner says he wants to do on Facebook, Pet'r Br. 18-19, can also be easily achieved through Internet sites dedicated to those activities. While social networking sites might be easy and popular "one stop" sites for certain uses, innumerable other sites enable him to exercise his religion, petition a public servant, send a family member a photo, or learn where a local food truck can be found for lunch. *See, e.g.*, https://w2.vatican.va/content/francesco/en.html (Vatican site with Pope Francis's letters, messages, prayers, speeches, daily meditations); https://www.burr.senate.gov/ (Senator Richard Burr's web page with contact information); https://www.shutterfly.com/nav/signedOutShare.sfly (free private photo sharing site); https://www.foodtrucksin.com/city/raleigh_nc; http://trackintrucks.com/RDU/ (sites locating and discussing local food trucks in Raleigh).

The principal case upon which petitioner relies, *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), has little in common with this case. *City of Ladue* involved a ban on residential signs, a means of communication this Court found to be "venerable" and "both unique and important" based on the distinct message such signs convey because of their location and close

identity with the speaker, their affordability, and the "special respect for individual liberty in the home." *Id.* at 54-58. There is no unique and special regard for individual liberty on social networking sites, which can and do exclude sex offenders from using them. *See Restriction or Ban of Social Networking Use for Sex Offenders Compilation* 1 (2013) (noting that "[t]wo of the largest social networks, Facebook and MySpace forbid sex offenders from using their web services").[16] Banning access to Facebook cannot be compared to a government effort to limit an individual's ability to speak on his own property.

Petitioner insists, however, that social networking sites are "unique" and that "[t]here are truly no alternatives." Pet'r Br. 55, 57. That cannot be the test. If an alternative channel of communication had to be a perfect substitute, few if any time, place, or manner restrictions would be upheld. All litigants challenging restrictions on a particular channel of communication prefer that channel to others based on its particular features. But the First Amendment allows the government to restrict access to particular means of communication where ample *alternative* ways to communicate remain. While perhaps there is no single "alternative channel" that may currently equal Facebook, the vast array of different sites that remain available to sex offenders—but on which minors cannot be easily and invisibly identified—

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[16] Available at http://www.ndaa.org/pdf/Sex%20Offenders%20and%20Social%20Networks_2013.pdf.

provides ample alternative channels of communication to social networking sites such as Facebook.

III. Section 202.5 is Constitutional as Applied to Petitioner and On Its Face.

Petitioner's claim fails both as applied to him and as a facial challenge to the statute.

1. He insists, with little explanation, that "[a]t a bare minimum, Section 202.5 may not constitutionally be applied to [him]." Pet'r Br. 61. To the contrary, even if the statute is unconstitutional in some of its applications, no First Amendment right of his was infringed in this case.

First, petitioner has never disputed that Facebook clearly falls under Section 202.5 or that he knew he was prohibited from accessing commercial social networking sites. Indeed, he signed a document acknowledging his awareness of this, J.A. 138-40, and later stated that he knowingly violated Section 202.5 because he thinks the law is "ridiculous" as applied to him since he is "not a pedophile."[17] He has no first-party standing, therefore, to assert vagueness or that the statute is overbroad because it purportedly applies to sites such as nytimes.com. Nor, because he committed his sex offense against a minor, does he have first-party standing to object to the law's inclusion of offenders whose past crimes were against adults.

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[17] John H. Tucker, *Durham Man Challenges Law on Sex Offenders and Social Networking Sites*, Indyweek (May 29, 2013).

Second, Facebook does not consider it at all ridiculous to prohibit sex offenders such as petitioner from its site. It expressly bars them, stating in its terms of service that, "You will not use Facebook if you are a convicted sex offender."[18] Facebook's ban on sex offenders is not mere happenstance. The Attorneys General of 49 States investigated Facebook and MySpace out of concern that sexual predators were using those sites to stalk children. These investigations led Facebook and MySpace to enter into agreements with the Attorneys General under which they implemented a series of steps to better protect children from predators.[19]

Facebook's policy banning sex offenders means petitioner had no right to use that site. Section 202.5, as applied to petitioner, therefore is akin to a state law making it a crime to trespass on another's property. *Cf. Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (rejecting First Amendment claim brought by

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[18] Terms of Service, Statement of Rights and Responsibilities, Registration and Account, item 6 (available at www.facebook.com/legal/terms).

[19] *See* Joint Statement on Key Principles of Social Networking Sites Safety (Jan. 14, 2008) (MySpace) (available at http://www.ncdoj.gov/getattachment/78eac9be-5ee9-4ffe-b2fb-1e76da3a4574/MySpace-Agreement-Joint-Statement-on-Key-Princip.aspx); Joint Statement on Key Principles of Social Networking Sites Safety (May 8, 2008) (Facebook) (available at http://www.nj.gov/oag/newsreleases08/Facebook-Joint-Statement. pdf); *see also*. Marion A. Walker, *Facebook gives sex offenders the boot*, Feb. 19, 2009 (available at http://www.nbcnews.com/id/29289048/ns/technology_and_science-security/t/facebook-gives-sex-offenders-boot/#.WG1a4hszVMw) .

person threatened with arrest for trying to "distribute handbills on [shopping mall owner's] private property contrary to its wishes and contrary to a policy enforced against all handbilling"). Petitioner fails to explain how North Carolina's statute can be unconstitutional as applied to him for "suppressing" speech he had no independent lawful right to make.

2. Nor can petitioner obtain relief on the ground that Section 202.5 violates the First Amendment rights of others. He broadly asserts that "[b]y criminalizing access without requiring any proof of wrongful intent or actual harm, the law may fairly be said to have *no* legitimate sweep." Pet'r Br. 61. That merely restates his categorical objection to preventative time, place, or manner laws—a contention refuted in §§I(B) and II(C)(1), *supra*.

To the extent he is arguing that a criminal statute must require proof of intent to harm in order to pass constitutional muster, he is wrong. For instance, criminal trespass may simply require a showing of the trespasser's knowledge that he lacks a privilege to be present; no intent to cause mischief after entry is required. *See Wright v. City of Philadelphia*, 409 F.3d 595, 603 (3d Cir. 2005).

Finally, petitioner's contention, Pet'r Br. 62, that Section 202.5 is "facially unconstitutional" because "[i]t is substantially overbroad" also fails for reasons previously discussed. Properly construed, the law bars access only to social networking sites as commonly understood—*i.e.*, Facebook, not nytimes.com. No showing has been made that any

applications of the statute, let alone a "substantial amount" of them, *United States v. Williams*, 553 U.S. 285, 292 (2008), would be unconstitutional.

CONCLUSION

The decision of the North Carolina Supreme Court should be affirmed.

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LESTER GERARD PACKINGHAM,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari
to the Supreme Court of North Carolina

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REPLY BRIEF FOR PETITIONER

The State no longer argues that Section 202.5 is mere "conduct regulation," Pet. App. 9a, and now recognizes that Section 202.5 restricts "protected speech," Resp. Br. 16, 24.

In fact, the burdens Section 202.5 imposes are unusual and severe. It forbids vast amounts of First Amendment activity on the very platforms over which Americans increasingly exercise their rights to speak, assemble, and petition the government. It operates selectively, singling out a small and unpopular segment of the State's population. And it does so through criminal punishment.

The State does not dispute any of this. Nor does it deny that almost all the protected activity Section 202.5 suppresses has nothing to do with criminal behavior. The State instead emphasizes Section 202.5's "preventative" bona fides, explaining how a "predator" could gather information on a social networking site as a "critical first step," Resp. Br. 35, 42, toward reprehensible crime. But that is not a First Amendment argument. The distance separating the power the State asks the Court to recognize and what the Constitution permits is the difference between a "prelude," *id.* 18, and a "clear and present danger." The First Amendment disables the State from punishing innocent, constitutionally protected activity on the ground that it could lead to crime *if engaged in by someone with criminal intent.*

Equally bootless is the State's campaign to have the Court review Section 202.5 as if it were a content-neutral time, place, or manner regulation. Section 202.5 is not such a law. But applying the test from *Ward v. Rock Against Racism*, 491 U.S. 781 (1989),

does not make Section 202.5's core defect—vast overbreadth—disappear. *Ward* directs that a law is unconstitutional when a "substantial portion" of its burdens falls on speech that does not implicate the evil targeted. *Id.* at 799. The State does not acknowledge that Section 202.5 imposes *any* unnecessary burdens and seeks to steer the Court as far away from narrow tailoring as possible. (Indeed, the State's "narrow construction" argument is just such a digression.) Section 202.5 in fact fails all the *Ward* prongs. As with any overbroad law, workable, less restrictive alternatives to Section 202.5 abound. But because the State fails to see cases like petitioner's as posing genuine First Amendment *problems*, it refuses to seriously consider measures that would target culpable actors *without* needlessly criminalizing core political and religious speech. The State's other arguments do little but reinforce the impression that Section 202.5 cannot be upheld under ordinary First Amendment rules. The Court's precedents foreclose the State's ill-considered suggestion of unrestrained governmental power to punish speech that violates a private contract. And there is not, as the State suggests, a "tradition" of depriving free speech rights based on prior convictions. *See* Resp. Br. 19. Were the Court to declare speaker-based discrimination a "virtue, not a vice," *id.* 11, things would not go well for the First Amendment.

ARGUMENT

I. The First Amendment Forbids Section 202.5's Crime-Prevention-Through-Speech-Prevention Approach.

1. Section 202.5 criminalizes core First Amendment activities without requiring any proof that they were connected to impermissible behavior. The State justifies that regime on the ground that accessing social networking sites can be a "critical first step" toward committing a serious crime. Resp. Br. 35.

Landmark First Amendment precedents reject this "first step" rationale. This Court's decisions settle that "[t]he prospect of crime . . . does not justify laws suppressing protected speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002). Rather, they hold that the government may punish a person for First Amendment activity that is not itself criminal only if it proves a tight nexus between the person's speech and the "lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam); *see also De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937); Petr. Br. 30-31. Were it otherwise, states could criminalize reading newspapers on the theory that gathering information about a government official's speaking schedule is a "critical first step" to planning an attack. *See Brandenburg*, 395 U.S. at 447 (describing as "thoroughly discredited" the "bad tendency" First Amendment standard applied in *Whitney v. California*, 274 U.S. 357 (1927) and *Gitlow v. New York*, 268 U.S. 652 (1925)).

2. There is a close resemblance—not a "world of difference," Resp. Br. 23—between this case and *Free Speech Coalition*. If anything, Section 202.5 is an even stronger candidate for invalidation than was the

statute there because the speech burden here is so far-reaching and indiscriminate, and the possible harm, so attenuated.

In *Free Speech Coalition*, the First Amendment activity the Court characterized as "innocent in [itself]" was possessing "virtual child pornography." 535 U.S. at 251. The Government defended its power to impose punishment based on detailed congressional findings that such material "can lead to actual instances of child abuse," both by enabling pedophiles to use the materials to "seduce children" and by making it difficult to convict persons for possessing or distributing actual child pornography. *Id.* at 250-51. The Court, however, rejected that assertion, explaining that the Government's rationale had "no justification in our precedents or in the law of the First Amendment." *Id.* at 256.

Precisely the same First Amendment principles indict Section 202.5. The fact that a social networking website "might be used for immoral purposes," *Free Speech Coalition*, 535 U.S. at 251, by someone with criminal intent does not confer the power to prohibit speaking or reading information on such sites. Indeed, rather than confining itself to one constitutionally protected but rather disgusting type of speech, Section 202.5 forbids vast swaths of core political, religious, and artistic expression. *See* Petr. Br. 18-21; Amicus Br. of EFF 8-24. And it does so without explaining *how* such activity could possibly lead to the commission of the criminal acts the State seeks to prevent.

3. The State cannot distinguish away *Free Speech Coalition* by asserting that the decision condemns only laws drawing "content-based" distinctions. *See* Resp. Br. 23-24. Congress could not have prohibited *all*

visual images on the ground that (1) some of them might be virtual pornography and (2) some of those images might contribute to the commission of a crime. Achieving "neutrality" by preventing even more speech from occurring is not what the First Amendment counsels. That is the plain import of *Near v. Minnesota*, 283 U.S. 697 (1931). There, the Court struck down a law that prevented persons previously convicted for publishing "criminal libel[s]" from accessing their presses based on the prospect that some of them might reoffend. *Id.* at 710.

Rather, as the Court explained in *Free Speech Coalition* itself, the government may violate the First Amendment "mandate in many ways," of which departures from content neutrality are just one. 535 U.S. at 244. The Court's decision is best understood as condemning laws that punish otherwise "innocent" speech on the theory that doing so will prevent criminal conduct. That same First Amendment principle has been enforced in decisions holding undeniably content-neutral laws unconstitutional. *See, e.g.*, *Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939) (striking down leafleting ban enacted to prevent littering). "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

II. Section 202.5 Is Not a Reasonable Time, Place, or Manner Regulation.

Contrary to the State's argument, Section 202.5 *is not* a "classic time, place, or manner" regulation. Resp. Br. 20. Unlike other laws the Court has analyzed under that rubric, Section 202.5 is a criminal statute, enforced only through felony prosecutions. The

metaphorical "places" in which it operates are continental in scope (Twitter's "population" is roughly 30 times North Carolina's[1]), and those "places" are not public property. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (contrasting the "constant and unavoidable" need for government to "mediate among various competing uses" of public venues with its narrower role in regulating speech on private property). And as explained below, Section 202.5 does not purport to treat would-be speakers evenhandedly. *See infra* 20-23.

In any event, whether or not it is useful to *analyze* Section 202.5 as a time-place-manner law, it is impossible to *uphold* it as one. The same defect that makes Section 202.5 plainly unconstitutional under *Free Speech Coalition* is what renders it unconstitutional under the *Ward* test: Virtually none of the vast amount of important First Amendment activity that Section 202.5 suppresses actually implicates the law's crime-prevention purpose.

A. Section 202.5 Fails Narrow Tailoring Because It Forbids and Punishes a Vast Amount of Speech Unrelated to the Protection of Minors.

1. Lost in the welter of argument about tiers of scrutiny and recidivism data is this fact: Respondent nowhere disputes that the evil the State aims to combat—gathering information for criminal purposes—accounts for a "minuscule" fraction of the First Amendment activity that Section 202.5 suppresses. *See Doe v. Prosecutor*, 705 F.3d 694, 699

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[1] *Compare QuickFacts: North Carolina*, U.S. Census Bureau, http://bit.ly/2lRf6Y9 (10 million), *with Twitter Usage*, Twitter, http://bit.ly/1mjyzhm (313 million).

(7th Cir. 2013). This failure is all the more glaring because *Ward* itself teaches that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." 491 U.S. at 799.

The First Amendment activity that Section 202.5 criminalizes is both enormous in scope and enormously important. *See* Petr. Br. 18-21; Amicus Br. of EFF 8-24. The law does not merely forbid a registrant from contacting a teenage account-holder (or from visiting her profile page). It prohibits him from "following" the President's Twitter feed or searching for a job on LinkedIn simply because some of those sites' hundreds of millions of users are under age 18 (and without regard to whether those sites allow adult users to view or access the profiles of minor users, *see* Petr. Br. 5-6).

This is Section 202.5's core overbreadth problem. Like the measure invalidated in *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), Section 202.5 suppresses all "First Amendment activities," *id.* at 574, without any effort to target activities implicating the government interest. Indeed, Section 202.5 is analogous to excluding solicitors from California, lest they take the "critical first step" toward soliciting in the LAX central terminal. Resp. Br. 35.

B. There Are Many Realistic, More Speech-Respecting Alternatives to Section 202.5.

1. The State's brief fails to demonstrate that the General Assembly considered any less restrictive alternative to Section 202.5. Instead, the State says that it need not refute every "imaginable alternative," Resp. Br. 44 (quoting *United States v. Albertini*, 472

U.S. 675, 689 (1985)), and that its "legislature's judgment" should not be "second-guess[ed]," Resp. Br. 40. But as *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), teaches, the State must present credible evidence as to why it was unable to address the problem "with less intrusive tools readily available to it." *Id.* at 2539.

The State's rote responses miss the point of the narrow-tailoring analysis. The First Amendment requires legislatures to see speech suppression as a "last resort." Total exclusion from social networking sites—and criminal punishment for religious speech—should at the very least have been recognized to pose serious First Amendment problems. And many ways of avoiding or reducing these burdens, *see* Petr. Br. 47-54, can be found in this Court's precedents, North Carolina's related statutes, and other states' responses to the same "national" problem, *see* Resp. Br. 31; Amicus Br. of State of Louisiana et al. 27-33 (only one other state—Louisiana—takes an even arguably comparable approach to North Carolina's).

2. The State does not address—much less explain—how codifying an affirmative defense, *see* Petr. Br. 49-50, would be any less "effective" than the current law. The State could still initiate a prosecution against the same registrants it does now. The only difference would be that registrants like petitioner, whose website activities are demonstrably innocuous, would not be convicted. And there is nothing "inapposite," Resp. Br. 45, about including an exception like the one in the State's cyberstalking law, N.C. Gen. Stat. § 14-196.3(e) ("This section shall not be construed to impair any constitutionally protected activity, including speech.").

3. Respondent fails to explain why a law directly targeted at information-gathering for improper purposes would be less effective than Section 202.5. Such a law would spare the First Amendment rights of those, like petitioner, who use a site to speak or who "gather information" about, say, a local book fair. It would also reach—as does the State's computer-solicitation statute, *see* N.C. Gen. Stat. § 14-202.3—all "potential sex offenders," Resp. Br. 32, not just the small subset who are on the registry, *see* Kimberly J. Mitchell et al., *Use of Social Networking Sites in Online Sex Crimes Against Minors*, 47 J. Adolescent Health 183, 187 (2010) (finding that *non-registrants* account for 98% of arrests for offenses against minors in which social networking websites were involved).

The State is simply wrong that such a law would not prevent harm. *See* Resp. Br. 44. The threat of punishment deters wrongdoing, and "harvesting" could be detected through targeted sting operations or even through data analysis. And a person caught—or suspected of—engaging in other misconduct would face prosecution for any pre-solicitation "harvesting" an investigation might uncover.

In fact, the same fault respondent finds with this alternative applies fully to Section 202.5: The statute *prohibits* accessing certain sites, but it does nothing to *detect* whether someone has accessed those sites. The State's arguments about detection oscillate wildly—depending on whether it is addressing Section 202.5 or a potential alternative. In the latter instance, the State chides petitioner for assuming that would-be criminals will volunteer their internet identifiers, noting that "[m]any registered sex offenders falsify their identity," Resp. Br. 36, and "remain invisible on

a social networking site," *id.* 4. But when asserting Section 202.5's "efficacy," respondent presumes these same "surreptitious" predators will forthrightly provide their online identifiers to law enforcement. *See* Resp. Br. 35.

4. The State says almost nothing to justify the legislature's extraordinary decision to exclude *all* registrants from *all* activity on the proscribed platforms for decades. The State touts as "individualized" a procedure that effectively determines whether registrants are subject to lifetime or 30-year speech restrictions, Resp. Br. 47-48, but nowhere explains why the legislature could not have provided an avenue of relief for registrants the State itself determines pose a low risk.[2] It is commonplace

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[2] The State repeats the statistic that previously convicted sex offenders have a "four times higher" sex-crime arrest rate than others. *See* Resp. Br. 37-38 (citing U.S. Dep't of Justice, Office of Justice Programs, *Sex Offender Management Assessment and Planning Initiative* 93 (2012) ["*DOJ Report*"]). But the State omits the actual percentages: 5.3% versus 1.3%. *See DOJ Report* 93. That still means that 94.7% of sex offenders were not re-arrested on sex-crime charges during the relevant period. *Id.*; *cf. United States v. Kebodeaux*, 133 S. Ct. 2496, 2503 (2013) (observing there is "conflicting evidence on" the issue of recidivism). Even if the State can constitutionally suppress speech and impose criminal punishment based on estimations of future risk, it surely may not do so on the ground that a person is a member of a legally created "class" that has a 5.3% average chance of re-offending. *See* Amicus Br. of Ass'n for the Treatment of Sexual Abusers et al. 11 (noting different types of offenders display different recidivism rates); *cf. Kansas v. Hendricks*, 521 U.S. 346, 358, 360 (1997) (upholding time-limited deprivation of physical liberty supported by rigorous individualized determination of uncontrollable danger).

for "preventative" restrictions imposed as part of *criminal sentences* to be individually tailored in breadth and duration. *See, e.g.*, *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (striking a probation condition that prohibited defendant convicted of receiving child pornography from accessing the Internet without permission). Section 202.5, inexplicably, accords less respect to the free speech rights of persons who have fully completed their sentences. *Cf. Doe v. Harris*, 772 F.3d 563, 572 (9th Cir. 2014) ("[R]egistered sex offenders who have completed their terms of probation and parole 'enjoy[] the full protection of the First Amendment.'" (alteration in original) (quoting *Doe v. Harris*, 2013 WL 144048, at *3 (N.D. Cal. Jan. 11, 2013))); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (applying narrowing requirements to speech injunctions).

C. Section 202.5 Does Not Further the Purposes Invoked to Justify It.

1. Section 202.5 is the rare law that is both vastly overbroad *and* plainly ineffectual. Child exploitation is a grave problem, but respondent offers no evidence—apart from unsupported assertions of "effectiveness"—that Section 202.5 has made any "dent," Resp. Br. 46, let alone one that would justify the far-reaching abridgments of free speech the law imposes. Respondent offers no statistics showing (or even claiming) progress compared to the 2008 figures it presents, *see id.* 31, or evidence that Nebraska or Indiana suffered setbacks when their essentially identical laws were held unconstitutional by federal courts. Nor does the State present even a single

anecdote of a would-be "predator" whose "harvesting" Section 202.5 thwarted.

Section 202.5 takes a very indirect approach to crime control—attempting to stop activity on certain websites by certain people, in the hopes of making it harder for would-be offenders to contact and then harm minors offline. On its own terms, Section 202.5 operates in a sliver of a corner of a large and complex problem. The vast majority of sexual offenses against minors do not involve the Internet, *see* Mitchell, *supra*, at 183-84 (online meeting offenses accounted for 615 out of 28,226 arrests in 2006), and the vast majority of sexual offenses are committed by non-registrants, *see id.* at 187.

If the General Assembly believed that registrants play an outsized role in *online* offenses, *see* Resp. Br. 32, or even that most online offenses are committed by strangers, it was mistaken. The very studies respondent cites say otherwise. *See* Janice Wolak & David Finkelhor, *Are Crimes By Online Predators Different from Crimes By Sex Offenders Who Know Youth In-Person?*, 53 J. Adolescent Health 736, 737 (2013) (There are "far more 'know-in-person' offenders" arrested for Internet-enabled offenses than "online-meeting offenders."). As the same researchers explain, public fears that "sex offenders are commonly using information that youth post online" to "track down unsuspecting victims" reflect a fundamental "misunderst[anding]." Janice Wolak et al., Univ. N.H. Crimes Against Child Research Ctr., *Trends in Arrests of "Online Predators"* 4 (2009).

2. But even within the narrow realm of preventing online information-gathering by registrants for improper purposes, Section 202.5 is ineffectual. The

State's brief itself explains how a registrant who actually accessed a website for predatory purposes could proceed surreptitiously, leaving Section 202.5 to catch only those who post openly. *See* Resp. Br. 36.

Worse still, not only is Section 202.5 overbroad, its requirements and exclusions undermine its purpose. For example, a "would-be predator" who actually "harvested" information about a minor would, inexplicably, go unpunished if he did so on a non-commercial website, *see* N.C. Gen. Stat. § 14-202.5(b)(1). Respondent attempts to defend exempting chat rooms, but it does not (and cannot) refute the broad consensus that such sites pose greater dangers for teenage users than do the ones Section 202.5 prohibits. *See* Petr. Br. 58-60 (explaining that exempted sites offer complete anonymity and generate no electronic data trail). Even the study the State cites, in an effort to rationalize the legislature's "judgment," is concerned exclusively with behavior in chat rooms. *See* Ilene R. Berson, *Grooming Cybervictims: The Psychosocial Effects of Online Exploitation for Youth*, 2 J. Sch. Violence 5 (2003). And the State's own suggestion, Resp. Br. 49-50, that it is perfectly permissible under Section 202.5(b) for a registrant to view everything on the proscribed websites so long as he asks a friend to print out materials for him, fatally undercuts any real function for Section 202.5.

The government need not proceed all at once. But a law, ostensibly enacted in response to a crisis of the highest order, that expressly exempts the most serious manifestations of the problem while suppressing large amounts of protected speech cannot be sustained.

D. Section 202.5 Forecloses Centrally Important Channels for First Amendment Activity.

To describe Section 202.5 as respondent does, as placing but "a few sites" off-limits, Resp. Br. 24, is no less truthful (but no less misleading) than saying a ban on circulating a magazine in Canada, the United States, Mexico, and Brazil applies to "a few countries in the Western Hemisphere."

These "few sites"—including Twitter, Facebook, YouTube, Instagram, and LinkedIn—play a central role in our Nation's political, cultural, spiritual, and economic life. The problem is not one of "[im]perfect substitute[s]" for these platforms, Resp. Br. 51, but the lack of any even remotely plausible ones, *see* Petr. Br. 55-56 (citing examples of political engagement, natural disaster response, education, and entertainment content that occurs exclusively through these sites); Amicus Br. of EFF 36-38 (explaining how "network effects" radically augment the value of users' speech on such sites). The patchwork of technologies and websites on which respondent says petitioner may still express an opinion or access discrete bits of information only proves the point. *See* Resp. Br. 49; *cf. Riley v. California*, 134 S. Ct. 2473, 2488-89 (2014) (emphasizing the "quantitative" and "qualitative" differences between a cellphone and a billfold).

Unable to plausibly dispute that these platforms are at least as important to expression and communication as the lawn signs in *Ladue*, respondent is left to argue that this medium is less "venerable." Resp. Br. 51 (quoting *Ladue*, 512 U.S. at 54). But that cannot be squared with the Court's First Amendment case law, *see Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (holding violent

"video games qualify for First Amendment protection"), especially when, as here, the focus is on a law's practical effect on individuals' present-day communicative activities.

E. The State's Statutory Construction Argument Is Both Wrong and Irrelevant.

The State devotes much of its brief to arguing a tertiary question: whether Section 202.5's "commercial social networking Web site" definition imposes a freestanding requirement that limits its prohibition to those sites which enable their members to include "links to other personal Web pages." *See* Resp. Br. 26-30. On the State's view, the "plain language" of Section 202.5(b)(3) establishes a "links" element for the statutory offense. And that element, the State further posits, is what defines "true social networking sites," *id.* 12—and what excludes, for example, the *New York Times* website.

1. Even if respondent were correct and only sites like Facebook, Twitter, LinkedIn, and Instagram were covered, Section 202.5 would be irredeemably overbroad. Indeed, if Section 202.5 just proscribed access to Twitter, it would still impose criminal punishment for the vast proportion of First Amendment activity on that platform which in no way implicates the evil against which Section 202.5 is directed.

2. But the State is incorrect. It seizes on the "plain language" of Section 202.5(b)(3), which includes the words "and links" as imposing an independent requirement. *See* Resp. Br. 12. This ignores, however, that those two words appear at the end of a list of items introduced by "such as." N.C. Gen. Stat. § 14-202.5(b)(3). In fact, as this Court has explained—

parsing a regulatory definition reading "functions *such as* caring for one's self, . . . breathing, learning, *and* working"—the phrase "such as" signals that none of the items enumerated on a list is required. *Bragdon v. Abbott*, 524 U.S. 624, 638-39 (1998) (emphases added) (quoting 28 C.F.R. § 41.31(b)(2)).[3]

The signals respondent claims to discern in the decision below are entirely illusory. The State presented this theory to the State Supreme Court, arguing that the Court of Appeals had erred by failing to perceive a freestanding "links" requirement that would exclude nytimes.com. *See* Appellant N.C. Sup. Ct. Br. 20-21. The North Carolina Supreme Court did not endorse that proposed reading. Instead, it assumed the lower court's reading was correct, but nevertheless concluded that sufficient alternatives remained. *See* Pet. App. 16a-17a. What respondent points to as "strong" support in the opinion for a "links" requirement is in fact none whatsoever. The court described Section 202.5 as targeting sites where visitors "could actually gather information," Resp. Br. 10 (quoting Pet. App. 25a). But that description self-evidently covers a profile page, *without links*, that displayed a teenage user's "photograph[]" and "other

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[3] Treating "links to other personal Web pages" as a freestanding requirement also renders the surrounding text incoherent. Both Subsections 202.5(a) and 202.5(b)(3) clearly provide that sites that *do not* enable creation of "personal Web pages" may be covered (if they permit minors to "become members" or create "personal profiles," respectively). If all sites must "link[] to other personal Web pages," this definitional language would make no sense.

personal information." N.C. Gen. Stat. § 14-202.5(b)(3).

3. The ostensible "plain language" interpretation is inconsistent with the one adopted in the acknowledgment form the State elsewhere touts as attesting to petitioner's understanding of Section 202.5's prohibition. *See* Resp. Br. 52. That document—which the State created—makes no mention of "links," let alone a "links" requirement. *See* J.A. 140. Rather, the form's summary of Subsection (b)(3) says (consistently with the statutory language) that any site that "allow[s] users to create Web pages or personal profiles," is off limits. *Id.*; *see also* Trial Tr. 267 (jury instructions at petitioner's trial did not specify a freestanding "links" requirement).

4. Even now, there are reasons to doubt the real-world value of the State's interpretation. Nine days after the State's brief was filed, law enforcement authorities arrested a registrant for accessing Snapchat—an application that almost certainly could not meet a "link" requirement. *See* Warrant for Arrest, *State v. Wray*, No. 17CR-050269 (N.C. Dist. Ct. Jan. 26, 2017). And the State does not deny that registrants have been convicted for accessing YouTube, *see* Petr. Br. 8 n.2, a site that few would describe as a "social networking site," *cf.* Sarah Perez, *YouTube Gets Its Own Social Network with the Launch of YouTube Community*, TechCrunch (Sept. 13, 2016), http://tcrn.ch/2cVdvx0.

As amici explain, this definitional uncertainty is the beginning, not the end, of a parade of critical ambiguities. *See* Amicus Br. of CATO Inst. & ACLU 17-19. (It is unclear whether nytimes.com would be safe under respondent's theory if, say, a commenter

could link to a personal page in a comment.) No lawyer acquainted with the text and enforcement history of Section 202.5 and the State Supreme Court's opinion could responsibly counsel a registrant client as to which sites, including the *New York Times*, he could visit without risking prosecution.[4]

III. Section 202.5 Is Unconstitutional in This and Every Case.

"The facts of this case are illustrative," Resp. Br. 17, of the fundamental defects that afflict Section 202.5. Petitioner was convicted for engaging in fully protected First Amendment activity. And the State, which obtained petitioner's computer drives and Facebook account records, has never accused him of saying anything worse than "God is Good!" or of "harvesting" information at all. Thus, the fact that Section 202.5 treats as "irrelevant," *id.*, whether a registrant is using social networking sites for criminal or constitutionally-protected purposes is precisely the reason the law cannot stand.

1. The State's repeated attempts to justify petitioner's conviction based on an alleged "breach[of] Facebook's terms of service," Resp. Br. 6, need not detain the Court. Facebook's "term of service" played

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[4] All the same points—especially irrelevance to the First Amendment question presented—apply equally to respondent's quarrel over the meaning of "access." *See* Resp. Br. 28 (claiming "access" requires logging into a site). Section 202.5(b)(3)'s text, which requires that information be viewable by a site's "users" or "visitors," all but rules out this reading. But text aside, it is strange—given the statute's avowed purposes and testimony in this case that personal information could be viewed on Myspace without signing in, *see* J.A. 12—that the State insists on the narrower reading.

no part in petitioner's indictment, trial, and conviction, or in the decision below sustaining Section 202.5. Indeed, the State continues to prosecute registrants under the statute for accessing sites—such as YouTube, Google+, and Instagram, *see* Petr. Br. 8 n.2—whose terms of service include no comparable restrictive provision, Amicus Br. of EFF app. 1, 5.

The notion that the First Amendment limits on governmental action apply only to speech a person has an "independent lawful right to make," Resp. Br. 54, under private contract or property law is flatly inconsistent with settled precedent. *See, e.g.*, *Virginia v. Black*, 538 U.S. 343, 350, 367 (2003) (granting relief on First Amendment claim of defendant convicted for burning cross on African American neighbor's property); *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (overturning conviction of defendant for speech that would surely have violated Facebook's terms of use); *United States v. Stevens*, 559 U.S. 460, 465, 482 (2010) (invalidating ban applicable only to depictions of *unlawful* animal mistreatment).

Moreover, this case does not involve North Carolina's enforcing a private contract or petitioner's challenging contractual terms. It arises from the State's convicting and punishing petitioner under its criminal law. Indeed the lone decision respondent cites, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), reinforces petitioner's point. *See* Resp. Br. 53. *Lloyd Corp.* relied on the basic state action principle that private entities—be they operators of shopping centers or of websites—are not constrained by the First and Fourteenth Amendments. 407 U.S. at 568-69. Indeed, if, as respondent proposes, the government's powers to

impose criminal punishment really were coextensive with Facebook's, this Court's First Amendment doctrine would look very different. After all, Facebook bars:

- False personal information, *but see United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012);
- Unauthorized commercial communications, *but see Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976);
- Hateful speech, *but see Elonis*, 135 S. Ct. at 2011;
- Nude, graphic, or gratuitously violent content, *but see Free Speech Coalition*, 535 U.S. at 240.

See Statement of Rights and Responsibilities, Facebook, https://www.facebook.com/terms.

2. Nor, contrary to respondent's intimations, *see* Resp. Br. 7, did petitioner engage in surreptitious use of social media. What respondent labels a "fictitious name," *id.*, is actually a common way many Facebook users identify themselves: the first name petitioner goes by in everyday life ("J.R.") plus his middle name A would-be offender seeking to proceed stealthily would not have established a publicly viewable Facebook profile that included, as petitioner did, his photograph and other personal information. *See* J.A. 136.

IV. Speaker-Based Discrimination Is a First Amendment Vice.

Respondent's argument leaves the rails when it claims that Section 202.5 depends "simply on 'where [people] say [something],'" Resp. Br. 17 (quoting

McCullen, 134 S. Ct. at 2531). To the contrary, Section 202.5 is directed at *who* the speaker is. For the vast majority of North Carolinians, saying "God is Good!" to Facebook friends when recounting an interaction with the judicial system is as First Amendment-protected as speech gets. But for individuals on North Carolina's registry, *that* speech becomes a felony.

1. This Court has repeatedly recognized that measures "select[ing] among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 194 (1999). Indeed, neutrality among speakers is a defining feature of the time, place, or manner laws that respondent urges provide the relevant precedent for evaluating Section 202.5. *See Ward*, 491 U.S. at 787 (noise control measure applied to "all performances at the bandshell"); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (rule "applie[d] evenhandedly to all who wish[ed] to distribute materials" at state fair).

2. The State nonetheless persists, inviting the Court to treat the fact that Section 202.5 singles out only "a small percentage of the population," Resp. Br. 24, for far-reaching burdens as a positive good, not a "vice," *id.* 11. That assertion is a stark inversion of settled principles. To be sure, *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994), declined to apply strict scrutiny to the speaker-based distinction at issue. *See* Resp. Br. 18. But the Court has also said that laws that "identif[y] certain preferred speakers" can work "a constitutional wrong." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

3. The State's real submission is that abridgments of the free speech rights of "this class of individuals," Resp. Br. 20, is permissible. The State brandishes a list of "civil disabilities [imposed] on persons convicted of crimes even after they completed their criminal sentences," *id.* 18-19, to argue that "individuals who have proven themselves unable to abide by society's laws," *id.* 43, enjoy permanently diminished First Amendment protection. That is wrong.

None of the civil disabilities on the State's list involves a forfeiture of free speech rights. Thus, states may deny many important benefits based on criminal convictions: government jobs, occupational licenses, and security clearances. *See* Resp. Br. 19. But the rights the First Amendment secures do not "derive from the beneficence of the state," *Alvarez*, 132 S. Ct. at 2550, so a person previously convicted, who is no longer serving a sentence, has an equal right to "speak his mind," *Bridges v. California*, 314 U.S. 252, 270 (1941).

That principle was enforced in *Near* when the Court invalidated a law withholding rights to publish based on prior convictions. *See* 283 U.S. at 738. And *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), offered one important reason for affording full protection: persons who have been criminally convicted have important things to say. *Id.* at 121 (noting Malcom X and Henry David Thoreau are among "American prisoners and ex-prisoners" who wrote about their experiences). For persons who are subject to the many other disabilities respondent describes, "the right to use speech to strive to establish

worth, standing, and respect" is especially valuable. *Citizens United*, 558 U.S. at 340-41.

The Court's decisions in *Richardson v. Ramirez*, 418 U.S. 24 (1974) and *District of Columbia v. Heller*, 554 U.S. 570 (2008), addressing governmental power to restrict voting rights and gun ownership of those formerly convicted, do not, as respondent presumes, supply new authority to suppress speech. *See* Resp. Br. 19. As those decisions make clear, the contours of the rights at issue, like those under the First Amendment, are informed by history and "tradition." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *see Richardson*, 418 U.S. at 48-49 (discussing text of Fourteenth Amendment in light of state practice of disenfranchising felons contemporaneous with ratification); *Heller*, 554 U.S. at 626 (recognizing historical limitations on the right to carry weapons). *Heller*'s observation that guns may be barred from government buildings, 554 U.S. at 626, did not signal a retreat from *Cohen v. California*, 403 U.S. 15 (1971). Nor, presumably, would a decision upholding licensing of firearms dealers grant authority for licensing book sellers.

4. In the end, the State's request to recognize a class of lower-value speakers—that is, a group whose First Amendment rights are entitled to less protection—would be a step no less "startling and dangerous" than the lower-value *speech* theory this Court rejected in *Stevens*, 559 U.S. at 470. That the State would assert that discrimination is a "virtue" in support of a law singling out a "small percentage of" the State's citizens who are feared and despised is an independent reason for disapproval.

CONCLUSION

For the foregoing reasons, the decision of the North Carolina Supreme Court should be reversed.

Respectfully submitted,

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RECORD AND BRIEFS

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LESTER GERARD PACKINGHAM,
Petitioner,

v.

NORTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF *AMICUS CURIAE* ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS; NATIONAL ASSOCIATION FOR RATIONAL SEXUAL OFFENSE LAWS AND NORTH CAROLINA RSOL IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF AMICI CURIAE[1]

The Association for the Treatment of Sexual Abusers ("ATSA") is an international, multi-disciplinary professional association dedicated to the research and prevention of sexual assault. ATSA's membership includes leading researchers in the study of sexual violence as well as professionals who evaluate and treat sexual offenders, sexually violent predators, and victims. Members work closely with public and private organizations such as prisons, probation departments, law enforcement agencies, child protection services, prosecutors, public defender's offices, victim advocacy groups, and state legislatures to enhance awareness of and protection from sexual assault. ATSA advocates for evidence-based practices and policies that seek to protect the public from sexual violence while allowing for the rehabilitation of sexual offenders. ATSA's interest in this case is to offer a uniquely informed perspective on the current research regarding the diagnosis and treatment of sexual offenders as a means of ensuring that legislation targeting them is sound. ATSA has previously appeared as amicus curiae in several of this Court's cases, including *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003); *Kansas v. Crane*, 534 U.S. 407 (2002); and *Kansas v. Hendricks*, 521 U.S. 346 (1997).

The National Association for Rational Sexual Offense Laws ("NARSOL") is a national nonprofit organization exclusively dedicated to advocating for

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[1] This brief was written by counsel for amici and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

rational, evidence-based sexual offense prevention policies. NARSOL promotes legislation that targets harmful *acts*, and it is dedicated to defending the constitutional rights of American citizens and their families who suffer damaging collateral consequences as a result of overbroad sexual offense laws. NARSOL holds several conferences across the United States each year promoting its values of public safety and tailored sexual offense legislation. NARSOL's interest in this case is to provide a practical perspective on the difference between targeted legislation that seeks to reduce recidivism based on evidence, and overbroad legislation that impacts registrants who have successfully completed their sentences.

North Carolina RSOL (NCRSOL) is an affiliate of NARSOL and represents more than 17,000 registrants in North Carolina, all of whom are subject to the State's social networking ban. NCRSOL's advocacy efforts have been largely constrained by the ban, as its leaders are unable to use social media as a means of engaging the public and declaring its legal and political objectives.

* * *

Amici submit this brief to provide an empirical and practical context for the Court's review of whether the social media ban that North Carolina imposes on all registrants violates the First Amendment.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

No one disputes North Carolina's "paramount governmental interest" in protecting minors from sexual abuse. N.C. Gen. Stat. § 14-208.5. The problem, however, is North Carolina's approach to

regulating the conduct of its residents who appear on the State's sex offender registry. In addition to restricting registrants' employment, travel, housing, and parenting, *see, e.g.*, N.C. Gen. Stat. § 14-208.18, North Carolina forbids all registrants from accessing certain social networking websites, *id.* § 14-202.5, including several websites that primarily "provide both a forum for gathering information and a means of communication." Pet. App. 9a.

Petitioner persuasively argues that this statute sweeps far too broadly to withstand any sort of First Amendment scrutiny, "punish[ing] vast amounts of protected activity to reach the miniscule fraction that implicates the government's purpose." Pet. Br. 16. This brief highlights the lack of fit between the government's goals and its means of achieving them.

I. There is universal agreement among professionals that restrictions on registrants must have some basis in empirical reality to be effective. One such reality is the fact that registrants are not a homogenous group of "sex offenders" that should be monolithically managed. Rather, registrants comprise a diverse group of individuals, each different from the next in terms of past criminal history, behavioral patterns, and risk of recidivism. On top of the fact that the observed recidivism rates for "sex offenders" in the aggregate are far lower than what conventional folk wisdom suggests, differences in recidivism risk among the diverse registrant population require a tailored rather than uniform approach to crime prevention.

In place of "one-size-fits-all" legislation, individualized risk assessments are commonly used to identify registrants who pose an actual risk of

committing future harm. These risk assessments consider several variables that isolate and separate the risk of future harm from past offenses, allowing preventive legislation to then be tailored to target high-risk individuals.

Unlike overbroad and unfocused legislation—which has been shown to increase the risk of recidivism—targeted legislation allows registrants to successfully reenter with society, thereby reducing their risk of recidivism. Targeted legislation also makes fiscal sense, as it directs public resources to programs that are actually effective at preventing future harm rather than those that have little to no impact at all.

II. North Carolina's social networking ban is a prime example of an overbroad and ineffective approach to crime prevention.

Rather than relying on evidence, the State relies on misconceptions about sex offenders. The goal of the statute is to protect minors from having their information "harvested" from social networking sites, but it does very little to achieve it. Imposing the restriction on all registrants ignores the fact that a substantial portion of the registrant population appears on the registry for reasons that have nothing to do with minors or social networking. It also ignores widely-accepted data that (1) most victims of sexual crimes know their attacker; (2) most victims live with their attacker; and (3) most attacks are committed by first-time offenders, not registrants. The State cannot simply invoke its compelling interest in protecting minors to explain how the statute will in fact accomplish that goal.

The overbreadth of this statute causes significant collateral harm. It not only cuts off registrants from expressing their thoughts on Facebook, reading the news from nytimes.com, or even engaging in a political dialog with Donald Trump on Twitter. It also denies registrants access to what have become ubiquitous avenues of social interaction, stunting their ability to successfully reenter society. Whether it's creating a Facebook page to advertise a new startup company, keeping up with the school bus schedule on Twitter, or connecting with a new employer on LinkedIn, social networking websites have revolutionized the way people connect with one another. Participating in these networks maximizes registrants' chances of leading normal and successful lives; banning them compromises those chances significantly.

N.C. Gen. Stat. § 14-202.5 violates the First Amendment, and the judgment below should be reversed.

ARGUMENT

I. Regulations Seeking To Prevent Sexual Offenses Should Be Based On The Empirical Realities Of Sexual Offending.

The effectiveness of crime prevention policies hinges on their basis in empirical reality. That is especially true for policies that intrude on constitutionally-protected freedoms. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 530–31 (2001) (finding "no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions"); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 474 (2001) (Thomas, J., dissenting) ("'[W]e have

never accepted mere conjecture as adequate to carry a First Amendment burden.' Some 'quantum of empirical evidence [is] needed to satisfy heightened judicial scrutiny of legislative judgments.'" (citations omitted)). Nevertheless, "[d]espite the intuitive value of using science to guide decisionmaking, laws and policies designed to combat sexual offending are often introduced or enacted in the absence of empirical support."[2] These policies are frequently rushed, relatively uninformed, and even faddish in response to extreme cases.

As the Department of Justice has repeatedly stressed, "crime control and prevention strategies—including those targeting sex offenders—are far more likely to be effective and cost-beneficial when they are based on scientific evidence about what works."[3] Although researchers can disagree about what works best, there is unanimous professional consensus about what does *not* work—regulating registrants as a homogeneous group with "one-size-fits-all" legislation. For crime prevention legislation to work, individualized risk assessments and tailored, evidence-based policies are necessary.

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[2] Christopher Lobanov-Rostovsky, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Adult Sex Offender Management* 1 (2015), https://goo.gl/Bm4Pca.

[3] Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Sex Offender Management Assessment and Planning Initiative* xiii (2014) [hereinafter SMART Report], https://goo.gl/LmYQOp.

A. Registrants are not a homogenous group of "sex offenders" and should not be regulated as such.

Crime prevention policies that target registrant conduct often rest on a false premise: that "sex offenders" are a homogenous group ripe for uniform regulation. This "myth of homogeneity" permeates policymaking decisions despite universal agreement that registrants comprise a heterogeneous collection of individuals who vary widely in "offense profiles, behavioral patterns, motivations, and risks of re-offense."[4] Gliding over these differences using a "one-size-fits-all" approach ignores "the heterogeneity of sexual offenders and overmanages some sexual offenders unnecessarily."[5] *See Smith v. Doe*, 538 U.S. 84, 117 (2003) (Ginsburg, J., dissenting) ("However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.").

1. The phrase "sex offender" itself is not an empirical category; it merely represents a *legal* category of individuals convicted of some form of unlawful sexual activity that requires registration. The panoply of registerable offenses dispels any notion

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[4] Andrew J. Harris & Kelly M. Socia, *What's in a Name? Evaluating the Effects of the "Sex Offender" Label on Public Opinions and Beliefs*, 28 Sexual Abuse 660, 661 (2016); *see also* Gwenda M. Willis, Jill S. Levenson & Tony Ward, *Desistance and Attitudes Towards Sex Offenders: Facilitation or Hindrance?*, 25 J. Fam. Violence 545, 551 (2010) ("[i]t is well known that sex offenders do not represent a homogenous group").

[5] Christopher Lobanov-Rostovsky & Andrew J. Harris, *Reconciling Sexual Offender Management Policy, Research, and Practice*, in *Sexual Offending* 843, 853 (Amy Phenix & Harry M. Hoberman eds., 2016).

that registrants are a uniform population. *See, e.g.*, N.C. Dep't of Justice, *The North Carolina Sex Offender & Public Protection Registration Programs* 25–30 (2014), https://goo.gl/DMpIrB (listing the 41 offenses in North Carolina that require registration); *see also* Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 Harv. C.R.-C.L. L. Rev. 435, 455 (2010) (examining the various crimes that are substantially represented on state registries, "including flashers, gropers, voyeurs, prostitutes, persons who have engaged in an adult incest relationship, stalkers, and those who have committed bestiality").

2. From a crime prevention perspective, one of the most important components of registrant heterogeneity is risk of recidivism. Recidivism rates in this context can be difficult to measure, and the results often vary due to differences in defining recidivism (i.e., re-arrest versus reconviction), differences in the length of follow-up period, differences in the populations being studied, and problems of underreporting.[6]

a. Before examining the differences in recidivism risk, it is important to note that research has consistently demonstrated that "sex offenders have lower overall recidivism rates than non-sex offenders." Przybylski, *supra* note 6, at 4. In fact, most studies have concluded that the recidivism rates for sex offenders are the lowest of any offense group except homicide. *See, e.g.*, SMART Report, *supra* note 3, at 93; *cf. Doe v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016)

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[6] Roger Przybylski, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Recidivism of Adult Sexual Offenders* 1–2 (2015), https://goo.gl/bJ3nx2.

(noting "the significant doubt cast by recent empirical studies on the pronouncement in *Smith* [*v. Doe*] that '[t]he risk of recidivism posed by sex offenders is "frightening and high"'").

The most comprehensive recidivism study, conducted in 2003 and published by the Department of Justice, examined the recidivism patterns of male sex offenders released from prisons across fifteen states in 1994.[7] Comparing the re-arrest rates of sex offenders and non-sex offenders during the three-year testing period, the researchers found that the overall re-arrest rate of sex offenders was far lower than that of non-sex offenders. Langan, *et al.*, *supra* note 7, at 24.

The study also computed the re-arrest rates of sex offenders and non-sex offenders who were arrested for a *sexual* offense after being released from prison: from the sex offender group, 5.3% (517 out of 9,691) were arrested for a new sexual offense after being released from prison; from the non-sex offender group, 1.3% (3,328 out of 262,420) were arrested for a sexual offense after being released. *Id.* Thus, out of the total number of individuals who were arrested for a sexual offense, only 13% were prior sex offenders. *See id.*

The results of the 2003 study are consistent with the findings of several state-sponsored studies. The following table catalogs the results of different state-sponsored recidivism studies and provides the percentage of released sex offenders who were convicted of (or who returned to prison for) committing a new sex offense within the study's follow-up period.

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[7] Patrick A. Langan, *et al.*, Bureau of Justice Statistics, Dep't of Justice, *Recidivism of Sex Offenders Released from Prison in 1994* (2003), https://goo.gl/nLe1BA.

Study	New Sex Offense	Follow-up Period	Recidivism Measure
2003 Study[8]	3.5%	3 years	Reconviction
California[9]	3.2%	5 years	Return to Prison
	3.4%	10 years	
Connecticut[10]	2.7%	5 years	Reconviction
Indiana[11]	2.2%	3 years	Return to Prison
Michigan[12]	3.1%	4 years	Return to Prison
Minnesota[13]	5.7%	3 years	Reconviction
New York[14]	1.7%	3 years	Return to Prison
Washington[15]	2.7%	5 years	Reconviction

[8] Langan, *et al.*, *supra* note 7.

[9] Cal. Sex Offender Mgmt. Bd., *Recidivism of Paroled Sex Offenders – A Five (5) Year Study* 1 (2008), https://goo.gl/esBX7G; Cal. Sex Offender Mgmt. Bd., *Recidivism of Paroled Sex Offenders – A Ten (10) Year Study* 1 (2008), https://goo.gl/UwnD10.

[10] Criminal Justice & Policy Planning Div., State of Conn., *Recidivism Among Sex Offenders in Connecticut* 4 (2012), https://goo.gl/ZUcj0T.

[11] Indiana Dep't of Corr., *Recidivism Rates Compared: 2005 – 2007*, at 21–22 (2009), https://goo.gl/17NwK7.

[12] Citizens Alliance on Prisons & Public Safety, *Denying Parole at First Eligibility: How Much Public Safety Does It Actually Buy? A Study of Prisoner Release and Recidivism in Michigan* 21 (2009), https://goo.gl/ZRdEOM.

[13] Minn. Dep't of Corr., *Sex Offender Recidivism in Minnesota* 21 (2007), https://goo.gl/cXqYDR.

[14] State of New York, Dep't of Corr. & Cmty. Supervision, *2010 Inmate Releases: Three Year Post Release Follow-Up* 46–47 (2014), https://goo.gl/cC9EIQ.

[15] Wash. State Inst. for Pub. Policy, *Sex Offender Sentencing in Washington State: Recidivism Rates* 2 (2005), https://goo.gl/LRLQGi.

These studies show that the percentage of sex offenders who commit new sex offenses is low, much lower than conventional folk wisdom would have it.

b. More importantly, whatever the aggregate recidivism rates may be, "[d]ifferent types of sex offenders have markedly different rates of recidivism." SMART Report, *supra* note 3, at 102. Registrants with "no prior criminal history and clear evidence of stability and prosocial conduct in all other domains of their lives" have a much lower risk of reoffending—and therefore "require different responses"—than "[t]he minority of offenders who have a higher risk of reoffending." *Id.* at 85. Other recognized factors that contribute to disparate recidivism rates include the underlying crime of conviction,[16] the gender of the individual,[17] and his or her age at the time of release.[18] Additionally, "Internet offenders and conventional sex offenders are not synonymous groups"; they typically differ in offense history, recidivism rates, and the targets of future criminal behavior. SMART Report, *supra* note 3, at 84–85. Preliminary research indicates

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[16] For example, one study reported a 6% sexual offense recidivism rate after 5 years for incest offenders, *see* SMART Report, *supra* note 3, at 102; another showed exhibitionists having an 11.7% recidivism rate after approximately 6.8 years, *see* Przybylski, *supra* note 6, at 4.

[17] Research has shown that female sex offenders reoffend at significantly lower rates than male sex offenders, with most studies putting their recidivism rate at approximately 1% in a five-year follow-up period. SMART Report, *supra* note 3, at 96.

[18] One study found that older sex offenders (i.e., those over age 50 when released) recidivated at less than *half* the rate of younger offenders. Andrew J.R. Harris & R. Karl Hanson, *Sex Offender Recidivism: A Simple Question* 8 (2004), https://goo.gl/nMoErU.

that "Internet offenders, as a group, have a relatively low risk of sexually recidivating compared to conventional contact sex offenders."[19] In short, as this Court has recognized, "a prediction of future criminal conduct is 'an experienced prediction based on a host of variables' which cannot be readily codified." *Schall v. Martin*, 467 U.S. 253, 279 (1984) (quoting *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 16 (1979)).

3. The demonstrable differences among registrants shows that they are far from homogeneous. Nor should they be regulated as such, for "[t]he belief no longer prevails that every offense in a like legal category" should be addressed "without regard to the past life and habits of a particular offender." *Williams v. New York*, 337 U.S. 241, 247 (1949). Rather, as the Department of Justice has explained, "the need for tailored rather than uniform interventions, and the need to match sex offender treatment and management efforts to the risk levels and criminogenic needs of sex offenders," is imperative. SMART Report, *supra* note 3, at 119.

B. Individualized risk assessments and tailored legislation recognize the realities of sex offending.

Instead of imposing "one-size-fits-all" regulations that target a monolithic "sex offender" category, research has shown that "the effectiveness of sex offender management policies relies on the ability of

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[19] Michael Seto, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Internet-Facilitated Sexual Offending* 4 (2015), https://goo.gl/kFLiXM.

criminal justice professionals to accurately differentiate sexual offenders." *Id.* at 112.

A more thoughtful analysis of registrant regulation begins by recognizing the difference between *offense seriousness*, which refers to "the normative decision by the courts" that is "based on a level of behavior rejected by the community," and *re-offending risk*, which refers to "predict[ing] the likelihood of re-offending" through empirical analysis and professional treatment.[20] While both are important, conflating the two will result in inefficient policies that do not actually address future harm. A registrant with a low risk of recidivism will usually require a different prevention-based response than one with a higher risk of recidivism, even if the lower-risk registrant's past offense was more serious. *See* Beech, *et al.*, *supra* note 20, at 225.

To account for this distinction, several states use actuarial risk assessment methods, which provide for individualized—and therefore more effective—treatment and management decisions for each individual registrant. *See* Lobanov-Rostovsky & Harris, *supra* note 5, at 854; *see also Doe v. Sex Offender Registry Bd.*, 41 N.E.3d 1058, 1069 (Mass. 2015) (cataloging the risk-based registry requirements in Arkansas, California, Georgia, Idaho, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Texas, Vermont, Washington). These methods typically include an initial recidivism risk assessment using specific risk factors and then allow for recurring assessments to "capture changes in risk over time [for

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[20] Anthony R. Beech, *et al.*, *The Internet and Child Sexual Offending: A Criminological Review*, 13 Aggression & Violent Behav. 216, 225 (2008).

the individual registrant] and ensure that case management strategies can be adjusted accordingly."[21]

Throughout the risk assessment process, both *static* risk factors (such as age at the time of offense, the number of previous convictions, and family history) and *dynamic* risk factors (such as sexual preferences, antisocial behaviors, hostility, substance abuse, and changes in social support mechanisms) are typically considered. *See* SMART Report, *supra* note 3, at 83, 114; *Twenty Strategies*, *supra* note 21, at 10. By conducting an individual risk assessment for each registrant, prevention policies can then target those who pose an actual threat of engaging in the disfavored predicate activity, such as "harvest[ing] information to facilitate contact" with minors. Pet. App. 13a; *see, e.g.*, Tex. Gov't Code Ann. § 508.1861(a) (West 2016) (applying a social networking ban to registrants who pose a risk of using a computer or the Internet to harm children).

Classifying registrants based on an actual, individualized assessment is not unfamiliar terrain, even in North Carolina. For some offenses, for example, North Carolina only requires defendants who are a "danger to the community" to register. *See* N.C. Gen. Stat. § 14-202(*l*).[22] The "danger to the

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[21] Center for Sex Offender Management, *Twenty Strategies for Advancing Sex Offender Management in Your Jurisdiction* 8 (2008) [hereinafter *Twenty Strategies*], https://goo.gl/gg9iB7.

[22] *See also, e.g.*, N.C. Gen. Stat. § 14-208.6(6) (identifying a "sexually violent predator" as an individual convicted of a sexually violent offense who also "suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization").

community" label applies "only . . . to those defendants who pose a risk of engaging in sex offenses *following their release from incarceration.*" *State v. Pell*, 712 S.E.2d 189, 192 (N.C. Ct. App. 2011) (emphasis added). Thus, each individual defendant is evaluated based on his or her risk of re-offending rather than on evidence about the defendant's "past offenses," which "offer[s] very little in the way of predictive statements concerning [the] [d]efendant's likelihood of recidivism." *Id.*

Indeed, for a variety of constitutional purposes, this Court has required that risk of future harm must be "made on an individualized basis, not by means of broad classifications." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 100–01 (1972); *see also Kansas v. Hendricks*, 521 U.S. 346, 364 (1997) (upholding Kansas's Sexually Violent Predator Act in part because the state legislature had "taken great care to confine only a narrow class of particularly dangerous individuals" by requiring individualized risk assessments). Such individualization supports the imperative "belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship." *Williams v. New York*, 337 U.S. 241, 249 (1949).

C. Individualized policies and targeted legislation increase public safety and maximize the use of public resources.

Evidenced-based legislation and individualized risk-assessment policies enjoy widespread acceptance in both research and policymaking circles because such approaches enhance public safety while simultaneously using public resources more efficiently.

First, targeted legislation significantly increases public safety. Rather than applying restrictions to all registrants without regard for their individual risk factors—which has been shown to *increase* recidivism rates, *see* Lobanov-Rostovsky & Harris, *supra* note 5, at 853—evidence-based policies and individualized risk assessments can accomplish the dual goals of reducing the number of sexual offenses overall *and* rehabilitating past offenders.[23]

Second, these targeted approaches are substantially more cost-effective than "one-size-fits-all" policies, which drain public resources to mandate compliance and "take funding away from more promising programs and services for victims."[24] The amount spent prosecuting this case, for example—a case in which the State knew from the get-go that the defendant had no illicit motive, *see* Pet. Br. 10–11—could have gone to more effective prevention measures. As the Department of Justice has observed, "[B]oth public safety and the efficient use of public resources would be enhanced if sex offender management strategies were based on evidence of effectiveness rather than other factors." SMART Report, *supra* note 3, at 146.

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[23] *See* Pamela M. Yates, *Treatment of Sexual Offenders: Research, Best Practices, and Emerging Models*, 8 Int'l J. Behavioral Consultation & Therapy 89, 93 (2013) (explaining that treatment is most effective when its intensity varies based on the level of risk posed by an individual offender).

[24] Jill S. Levenson, *An Evidence-Based Perspective on Sexual Offender Registration and Residential Restrictions*, in *Sexual Offending* 861, 866–67 (Amy Phenix & Harry M. Hoberman eds., 2016).

II. Forbidding All Registrants From Accessing Social Media Demonstrates An Overbroad And Ineffective Approach To Preventing Sexual Offenses.

The social networking ban that North Carolina imposes on all registrants exemplifies an overbroad and ineffective approach to regulating registrant conduct. By determining that all registrants—regardless of their underlying crime of conviction, prior criminal history, or recidivism risk—pose a significant threat of harvesting online information about minors, North Carolina's "one-size-fits-all" approach is based not on facts but on fear. And accompanying this approach are several collateral consequences that hamper registrants' ability to lead successful lives. "Surely, this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

A. The statute's overbreadth stems from legislating with misconceptions rather than evidence.

Although it is universally accepted that registrant regulations are effective only if they are based on empirical evidence, many—such as the one in this case—are not. Instead, they indulge misconceptions about "sex offenders," ignoring "whether the scope of the proposed [regulation] will be overly broad and inflict too-severe sentences on persons who commit less morally repugnant crimes." Paul H. Robinson, *et al.*, *The Disutility of Injustice*, 85 N.Y.U. L. Rev. 1940, 1988–89 (2010). Highly-publicized, sexually-motivated crimes tend to provoke public alarm, leading to legislation that will have little, if any, impact.

The statute in this case is a prime example—although protecting minors from sexual abuse is an

undisputedly compelling governmental objective, banning all registrants from accessing social networking websites will do very little to achieve it.[25] First, as Petitioner's brief points out, the ban applies to registrants who are registered for reasons that have nothing to do with minors or harvesting information about them. Pet. Br. 7–8. Second, most victims (93%) know their offender as either a family member or close acquaintance, not via information harvested from social networking websites.[26] Third, most offenses (85%) come from inside the home, not because of harvested information on social networking websites.[27] And fourth, most offenses (95%) are committed by a first-time offender, not by a registrant.[28]

That the State finds this data to be "astonishingly counter-intuitive" (BIO 33) further shows that the statute is based on "intuition" rather than actual evidence. Indeed, the State has not advanced *any*

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[25] In fact, researchers in one study were unable "to find cases of sex offenders stalking and abducting minors on the basis of information posted on social networking sites," despite "[m]edia stories . . . suggest[ing] that online molesters could use the information youths post about their identities and activities to locate and stalk [them]." Janis Wolak, David Finkelhor, Kimberly J. Mitchell, & Michele L. Ybarra, *Online "Predators" and Their Victims: Myths, Realities, and Implications for Prevention and Treatment*, 63 Am. Psychologist 111, 117 (2008).

[26] Bureau of Justice Statistics, Dep't of Justice, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 10 (2000), https://goo.gl/o5xnv9.

[27] Nicole Colombino, *et al.*, *Preventing Sexual Violence: Can Examination of Offense Location Inform Sex Crime Policy?*, 34 Int'l J. L. & Psychiatry 160, 161 (2011).

[28] *Id.*

actual evidence to support the breadth of this statute. When the court below explained that the State "must do more than simply 'posit the existence of the disease sought to be cured'" and that it must instead "demonstrate 'that the regulation will in fact alleviate these harms in a direct and material way,'" Pet. App. 21a (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)), the State simply reiterated "that protection of minors from known sexual predators is a vital duty, one [the North Carolina Supreme Court] has recognized in another context," *id.*

This is not the first time that North Carolina has failed to substantiate overbroad registrant restrictions with actual data. The Fourth Circuit recently held that a prior version of N.C. Gen. Stat. § 14-208.18(a)(2), which prohibited registrants from "being" at certain locations where minors may be present, was unconstitutionally overbroad under the First Amendment given the State's "lack of data, social science or scientific research, legislative findings, or other empirical evidence" supporting its "substantial interest in protecting minors from sexual crimes." *Doe v. Cooper*, No. 16-1596, 2016 WL 6994223, at *8 (4th Cir. Nov. 30, 2016). Even after such evidence was requested, "the State explicitly declined to introduce" anything other than "anecdotal case law" and "logic and common sense." *Id.* "Without empirical data or other similar credible evidence," the court explained, "it is not possible to tell whether subsection (a)(2)—and specifically its application to offenders with only adult victims—responds at all to the State's legitimate interest in protecting minors from sexual assault." *Id.* at *9.

North Carolina's interest in protecting minors from sexual abuse is undoubtedly compelling, but

"[t]he prospect of crime . . . by itself does not justify laws suppressing protected speech." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002).

B. The statute's overbreadth has damaging collateral consequences and impedes registrants' success at reintegrating into society.

Once a registrant completes his or her sentence, successful reentry into society depends upon stable and effective reintegration mechanisms. Research shows that registrants with access to stable housing, pro-social support networks, and employment opportunities are less likely to reoffend and more likely to lead normal lives. Willis, *et al.*, *supra* note 4, at 545. Policies that unduly isolate registrants from the rest of the community, on the other hand, "sacrifice a critical component of sexual abuse prevention" by increasing their risk of recidivism.[29]

Banning all registrants from social networking websites—ubiquitous mediums of social interaction that have "revolutionized the way people connect, communicate, and develop relationships"[30]—can severely stifle their post-conviction success. The magnitude of these websites is difficult to overstate; as the State acknowledged below, "If [Facebook] were a country, it would be the third most populous country on the planet." Brief for the State at 5, *State v.*

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[29] Joan Tabachnick & Alisa Klein, Association for Treatment of Sexual Abusers, *A Reasoned Approach: Reshaping Sex Offender Policy to Prevent Child Sexual Abuse* 26 (2011), https://www.atsa.com/pdfs/Policy/AReasonedApproach.pdf.

[30] Lynn A. McFarland & Robert E. Ployhart, *Social Media: A Contextual Framework to Guide Research and Practice*, 100 J. Applied Psychol. 1653, 1653 (2015).

Packingham, 748 S.E.2d 146 (N.C. Ct. App. 2013), 2013 WL 1232022.

Given the increasingly important societal roles played by these websites, completely banning registrants from them creates a dramatic effect on registrants' efforts to lead normal lives following their sentences. Amici offer five common examples of the collateral effects that the social networking ban has had on registrants:

- John Doe #1 cannot use Facebook or Twitter even though his child's school uses them as the primary means of communication with parents. The school updates its bus schedules via Twitter and posts announcements about weekly schedules and school closings on Facebook. He is forced to rely on his child to bring home letters and announcements, which often get lost along the way. Because John's registrant status also forbids him from being on school property, social networking websites would provide an important way for him to stay up-to-date on school events and become more actively involved in his child's life.

- John Doe #2 is employed in a part-time capacity and struggles to find more stable employment. Friends and co-workers have suggested that he use the professional social networking website LinkedIn to search for better employment opportunities, which he is unable to do because of his status as a registrant. His wife refuses to use social media herself, out of fear that her own usage will somehow result in local law enforcement believing that he is violating the social media ban. In light of the ban, he finds himself limited in his

search for a more substantive job and remains underemployed.

- John Doe #3 has attempted to follow the social networking ban, but has received conflicting information from local law enforcement about what websites actually fall within the scope of the law. Because the law's text does not clearly explain which websites are prohibited, he is uncertain about the sites he can visit, and as a result limits his Internet activity far beyond what the law actually covers.

- John Doe #4 owns a small business that he wishes to advertise on Facebook, Twitter, and other social media platforms. As it has become increasingly necessary for small businesses to use social networks to reach new customers, John has struggled to advertise his business as a result of North Carolina's ban. If he could advertise on Facebook and other social media, he could grow his business and make a better living to provide more support for his family.

- John Doe #5's friends and family communicate exclusively through Facebook and Twitter. Even though his offense did not involve social media, he is cut off from them and feels "separated from society." He is concerned about the damaging effects such isolation can have on other registrants in similar circumstances and worries that they will struggle to reintegrate back into society without that connection to stable, supportive relationships.

CONCLUSION

There is unanimous professional consensus that overbroad registrant restrictions, divorced from empirical support, do not have any meaningful impact on reducing sexual offending. North Carolina's paramount interest in protecting minors from sexual abuse will only be effected through targeted legislation that is responsive to data about what is needed and what works. Unfocused legislation will not do, especially when it has the collateral effect of unnecessarily suppressing basic constitutional freedoms.

The judgment below should be reversed.

Respectfully submitted,

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Petitioner,

v.

NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

BRIEF FOR *AMICI CURIAE* THE CATO INSTITUTE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA IN SUPPORT OF PETITIONER

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Supreme Court of the United States

No. 15-1194

LESTER GERARD PACKINGHAM,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR *AMICI CURIAE* THE CATO INSTITUTE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici have long advocated for the freedom of speech and expression in all its forms against encroachment by governmental power, particularly through the criminal law. *Amici* view the criminal statute at issue in this case as a sweeping and unconstitutional incursion on protected speech, and urge the Court to reverse the judgment of the Supreme Court of North Carolina.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to this brief's preparation or submission. Both parties have filed letters consenting to the filing of all *amicus* briefs.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, limited government, and peace. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review.*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 750,000 members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court in free speech cases, both as direct counsel and as *amicus curiae*, including cases addressing criminal prohibitions on speech. *See Virginia* v. *Black*, 538 U.S. 343 (2003); *United States* v. *Stevens*, 559 U.S. 460 (2010); *Elonis* v. *United States*, 135 S. Ct. 2001 (2015). The proper resolution of this case is thus a matter of substantial interest to the ACLU and its members. The American Civil Liberties Union of North Carolina is a state affiliate of the national ACLU.

SUMMARY OF ARGUMENT

Section 202.5 of North Carolina's criminal law cannot be reconciled with core First Amendment principles and decades of this Court's jurisprudence. Petitioner was convicted of a crime because he wrote a celebratory post on Facebook, exclaiming that "God is good" after he obtained the dismissal of a traffic ticket. More generally, the statute makes it a standalone violation of North Carolina's criminal code for any person who has previously been convicted of one of a host of

sexually related crimes, but is no longer under any form of incarceration or state supervision, to "access" a dizzying array of websites, including the websites of major newspapers and ubiquitous social media sites.

North Carolina's far-reaching criminalization of speech, information-gathering, and expression is unconstitutional for at least three reasons.

First, Section 202.5 is substantially overbroad, barring *any* use of websites like Facebook, YouTube, and Wikipedia, and even the reading of such news sites as *The New York Times*. The most natural interpretation of Section 202.5 suggests that it could apply to almost any website at all, subject only to the whims of those enforcing it. Section 202.5 potentially subjects thousands of people to criminal penalties based on protected expression relating to art, politics, religion, and family life that will almost always bear no relation to the law's supposed justification of protecting children from predators. Indeed, the only possible purported justification for Section 202.5 is that it operates as a broad-based prophylaxis against other behavior. But this Court has time and again rejected governmental efforts to justify sweeping and imprecise bans on protected speech simply because the ban includes within its scope a smaller category of unprotected speech or expression.

Second, Section 202.5 is also hopelessly vague. Criminal liability under the statute hinges on whether it is "known" that the website that is "accessed" somehow "permits" minor children to create profiles or pages. To the extent "permits" is tied to a website's terms of use, it provides no reasonable opportunity to know what is prohibited. The terms employed by even the most popular websites are hardly a model of clarity with regard to who may and may not use the site—

never mind that the terms themselves are normally only accessible by visiting the website, which potentially violates the statute by itself. And even if a site's terms of use clearly purport to bar minor children, such terms are frequently unenforced or ignored, leaving people to guess whether "permits" means in policy or in fact (or something else). Whatever answer one reaches about whether a given site "permits" use by minor children, the term is so capacious that those enforcing the statute could always reach a different answer depending on their whims. That is a telltale sign of vagueness. Section 202.5 therefore falls far short of the high degree of specificity this Court has long required for criminal prohibitions that intrude on First Amendment freedoms.

Third, Section 202.5 criminalizes speech based on the identity of the speaker—a hornbook First Amendment violation in itself, and one the Founders specifically sought to prevent.

This Court should reverse the judgment below and affirm, once again, that the Constitution does not permit sweeping prohibitions on speech, expression, and the receipt of information by disfavored members of society.

ARGUMENT

I. SECTION 202.5 IS UNCONSTITUTIONALLY OVERBROAD

For those to whom it applies, Section 202.5 is virtually boundless. The statute's plain language indicates that its prohibition encompasses the vast majority of the nation's most-visited and important websites. Although the statute's purported aim is to stop online stalking and predation of minor children, its effect is to criminalize massive amounts of online activity—from e-commerce, to family communications, to political and

religious speech—that fall far outside any legitimate State goal. Section 202.5 is a textbook case of unconstitutional overbreadth.

Section 202.5 warrants the most exacting scrutiny because its direct criminal prohibition on speech sweeps in large amounts of core protected speech, including religious and political speech and information-gathering, which are subject to the highest levels of First Amendment protection. *See, e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values'"); *see also, e.g.*, *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech ... is as fully protected under the Free Speech Clause as secular private expression. ... [A] free-speech clause without religion would be Hamlet without the prince."). Strict scrutiny is also appropriate because the statute singles out speech based on the disfavored identity of the speaker, rather than anything actually harmful about the speech itself. *See infra* Part III.

But Section 202.5 would still fail the overbreadth analysis if it were subject to a lower level of scrutiny. Even if Section 202.5 were viewed as a regulation of conduct ancillary to speech, or a content-neutral speech restriction subject to less exacting scrutiny, it must still be "'narrowly tailored to serve a significant governmental interest'" and may not "'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2534-2535 (2014) (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 796, 799 (1989)). In other words: If Section 202.5 prohibits far more speech than necessary to achieve its legitimate aims, it should be struck

down as overbroad regardless of the applicable level of scrutiny. Thus, this Court found a total ban on "First Amendment activities" at the Los Angeles airport to be overbroad because it "prohibit[ed] even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution." *Board of Airport Comm'rs of City of L.A.* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 574-575 (1987) (statute was overbroad even if LAX was viewed as a nonpublic forum subject to lesser scrutiny).

A statute is unconstitutionally overbroad under the First Amendment where "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The overbreadth doctrine guards against imprecise criminal laws whose extensive scope may chill legitimate, protected expression. *See, e.g.*, *New York* v. *Ferber*, 458 U.S. 747, 768-769 (1982) ("'[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'" (citations omitted)); *see also Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) (when the government restricts speech, "[p]recision of regulation must be the touchstone").[2]

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[2] The potential chilling of protected speech by overbroad criminal laws is so concerning that overbreadth challenges against speech-restrictive statutes are allowed even when advanced by defendants whose conduct might be properly proscribed under a more narrowly tailored law. *See Ferber*, 458 U.S. at 768-769.

The overbreadth analysis proceeds in two steps. First, the Court "construe[s] the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Stevens*, 559 U.S. at 474 (quoting *United States* v. *Williams*, 553 U.S. 285, 293 (2008)). Next, the Court considers the ultimate question whether "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 473, 481-482.[3]

A. Section 202.5 Prohibits A Wide Array Of Online Speech And Information-Gathering, Including Core Political And Religious Speech

Section 202.5 applies to any person who is a registered sex offender under North Carolina law. *See* N.C. Gen. Stat. § 14-202.5(a). North Carolina's registry law in turn applies whether or not a former offender is on parole or probation. *See generally id.* §§ 14-208.5 *et seq.* It applies for life as to those who have committed certain "sexually violent" offenses, and for a period of 30 years for all others. *Id.* §§ 14-208.6A, 14-208.7, 14-208.21.[4] It applies to former offenders who were convicted in North Carolina and out-of-state, under state

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[3] This Court has ruled that, "where conduct and not merely speech is involved," overbreadth must be "substantial" to transgress the Constitution. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). Here, Section 202.5, which prohibits all reading or communication on certain websites, targets exclusively speech, not conduct, and thus may be struck down even if its overbreadth is less than "substantial." Nevertheless, because of the virtually limitless scope of Section 202.5, it fails even under *Broadrick*'s more demanding standard.

[4] This 30-year period may be reduced to a minimum of 10 by court order. N.C. Gen. Stat. § 14-208.12A.

or federal law. *Id.* § 14-208.6(4). And importantly, the covered offense conduct runs the gamut from sexual assault against an adult, to statutory rape, to various forms of "secret peeping," to non-sexual offenses like kidnapping. *Id.* § 14-208.6(4)-(5). Thus, the registry law draws in numerous former offenders whose crimes never involved minor children or online solicitation or predation of any kind.

Under Section 202.5, any person required to register—that is, any person who has committed any of the offenses listed in the registry statute in the last 30 years or more—may not "access a commercial social networking Web site where the [person] knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. § 14-202.5(a). And "commercial social networking Web site" is in turn defined as any site that:

> (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
>
> (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
>
> (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

> (4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

Id. § 14-202.5(b). This broad definition is subject to two express exceptions: It does not include websites that "[p]rovide[] only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or [h]a[ve] as [their] primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors." *Id.* § 14-202.5(c). "[A]ccess[ing]" a covered site is a felony. *Id.* § 14-202.5(e).

Section 202.5 criminalizes *any* use of a covered site. "Accessing" a website can encompass myriad interactions ranging from creating an account and actively communicating through a social media site, to the most passing of uses, such as checking a store's business hours on a public Facebook page located through a Google search, or simply spending a few seconds on a site before realizing that one typed in the wrong web address.[5]

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[5] Or, as noted, *infra* p. 20, consulting the site's terms of use to try to determine whether it is covered by Section 202.5 in the first place. Moreover, any as-yet-identified limiting construction of the word "accessing" is likely to present an independent vagueness problem. That is particularly true in today's online environment, where many organizations have, for example, integrated Facebook into their websites as a comment platform. *See, e.g.*, Buzzfeed, www.buzzfeed.com (incorporating Facebook-based commenting for Buzzfeed articles); St. Louis Post-Dispatch, www.stltoday.com (same). Whether one has "accessed" Facebook by "accessing" a Buzzfeed page that integrates Facebook is far from clear (not to mention completely unrelated to Section 202.5's actual purposes).

Concrete examples demonstrate the statute's sweep. Section 202.5 appears to cover *any* use or viewing of social media and networking sites such as Facebook, Twitter, Instagram, and LinkedIn, which are among the Nation's preeminent fora for communication and the exchange of information and ideas. *See, e.g.*, Harawa, *Social Media Thoughtcrimes*, 35 Pace L. Rev. 366, 366 (2014) ("Social media is a necessary part of modern interaction."). It also seems to cover *any* viewing of discussion sites like Reddit that facilitate message boards on an unlimited array of topics, but also include other functionality, or Wikipedia, which is built and run by users who create profiles and group-edit the world's most popular encyclopedia in the site's discussion fora. *Cf.* Grimmelmann, *The Virtues of Moderation*, 17 Yale J. L. & Tech. 42, 79-102 (2015) (discussing the functions of Reddit and Wikipedia and the nature of such decentralized, user-moderated fora). It also apparently covers *any* use of web-based streaming sites like YouTube or Spotify, which allow users to watch videos or listen to music but also incorporate social functionality. And it would seem to encompass *any* use of some of the most important news sites, almost all of which feature commenting functions where users can create profiles and discuss and share perspectives on news content and current events. Indeed, the Supreme Court of North Carolina did not deny that Section 202.5 may ban covered persons from accessing the websites of the *New York Times* and other major news publications. *See* Pet. App. 17a (responding to this objection only by observing that "users may follow current events on WRAL.com, which requires users to be at

least eighteen years old [sic] to register with the site"); *see also* Pet. App. 33a (Hudson, J., dissenting).[6]

The result is that persons covered by Section 202.5 face criminal penalties for a dizzying array of expression and communication that encompasses the entirety of the social Web. *Cf. City of Ladue* v. *Gilleo*, 512 U.S. 43, 57 (1994) (striking down ban on residential lawn signs and noting that they are "an unusually cheap and convenient form of communication" that "may have no practical substitute."). Indeed, it appears that Petitioner and similarly situated residents of North Carolina would be forbidden from:

- watching (let alone commenting on) a documentary on the ongoing strife in Syria on the *New York Times* website;

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[6] The statute also seems to prohibit access to numerous e-commerce sites such as Amazon. That is because, while Section 202.5 exempts a site that has "as its primary purpose the facilitation of commercial transactions ... *between its members or visitors*," N.C. Gen. Stat. § 14-202.5(c)(2) (emphasis added), this exception by its terms applies only to peer-to-peer commercial sites, and not commercial sites where the transactions are between members or visitors and the site itself. *See* Pet. App. 33a & n.1 (Hudson, J., dissenting). Thus, almost all major consumer brand websites—such as those for Wal-Mart and Betty Crocker—are covered if they host comment or review sections and allow users to make profiles and engage in "information exchange[]" about the site's products. N.C. Gen. Stat. § 14-202.5(b)(3); *see also, e.g.*, Walmart.com (selling products and allowing users to create free profiles and comment on and discuss products); Bettycrocker.com (selling products and allowing users to create free profiles and comment on and discuss recipes). Again, the Supreme Court of North Carolina did not deny this; the most it could say was that a person barred from viewing the Betty Crocker website could visit the Paula Deen Network instead. *See* Pet. App. 17a.

- reading (let alone participating in) a discussion on /r/The_Donald, a major Reddit forum for supporters of President-Elect Donald Trump;
- visiting the profile page of a family member (let alone communicating with him or her) on Facebook, an Internet forum on which the majority of American adults share news, opinions, and updates about their lives;
- reading (let alone participating in) a discussion of local policing and criminal justice policy on Twitter;
- researching (let alone editing or discussing) an entry on the history of the Roman Republic on Wikipedia;
- searching for connections (let alone developing a professional network) on LinkedIn in order to seek new employment;
- listening to (let alone sharing or commenting on) the soundtrack to the Broadway musical *Hamilton* on Spotify;
- watching (let alone commenting on or sharing) a weekly sermon posted by one's church on YouTube.

Speech prohibited by Section 202.5, including discussion of public issues on fora like Facebook, falls in the heartland of the First Amendment's protection. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). And the statute also criminalizes forms of information-gathering—including regarding current events and political and religious matters—that this Court has also held to be within the core of First Amendment protection. *See Sorrell* v. *IMS Health*,

Inc., 564 U.S. 552, 567-570 (2011) (rejecting argument against full First Amendment protection where state law regulated "access to information"); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) (First Amendment protects the "right to receive information"). Given its massive sweep, Section 202.5 violates the First Amendment's overbreadth prohibition regardless of the applicable level of scrutiny.

B. Section 202.5 Criminalizes Vast Amounts Of Protected Speech That Is Unrelated To The Safety Of Minor Children

Section 202.5 fails this Court's established overbreadth test, reaching far beyond its supposed justifications and criminalizing protected speech and expression that have no relation to North Carolina's legitimate interests.

Section 202.5 is ostensibly meant to protect minor children from recidivist sexual predators. *See, e.g.*, Pet. App. 11a. But the provision is not restricted in its application to communications, expression, or information-gathering that is targeted at or has any relation to minor children. Instead, it sweeps up vast amounts of otherwise protected speech, including the receipt and communication of personal, political, civic, artistic, and religious ideas on many of the Internet's most widely used fora. The range of covered sites that may not be "access[ed]" on pain of felony conviction is vast (to the extent that it is discernable at all), and appears to include any site that (1) somehow generates revenue and (2) allows users to interact through some form of social functionality. This expansive category includes many of the nation's most popular and important websites. *See* Alexa, Top Sites in the United States, http://www.alexa.com/topsites/countries/US (listing YouTube,

Facebook, Amazon, Wikipedia, Reddit, Twitter—all of which are covered by Section 202.5—as six of the ten most-visited domains on the Web); *supra* pp. 8-12. The decision below made no attempt to excuse this dragnet, and instead merely asserted that the website of a local news channel was an adequate substitute for the websites of myriad major national newspapers to which access is denied. Pet. App. 17a. An overbroad ban on access to most of the nation's news sources cannot be saved by access to a single local news site.

Nor is Section 202.5 restricted in its application to those with a history of targeting minor children. Rather, it covers persons whose offenses involved adult victims, as well as some persons whose offenses were not sexual in nature at all. *See* N.C. Gen. Stat. § 14-208.6(4)-(5); *supra* pp. 7-8. And that overbroad universe of persons is in turn subject to overbroad restrictions on expressive activity.

The Constitution does not permit the government to outlaw a broad category of speech simply because it contains a smaller category that might be proscribable. As this Court has held, "[t]he governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno* v. *ACLU*, 521 U.S. 844, 875 (1997).

This Court's recent overbreadth decision in *Stevens* is right on point. There, a federal law that was intended to prohibit the sale of so-called "crush videos"—depictions of illegal animal abuse—swept far more broadly, criminalizing "any ... depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," thus outlawing, for example, depictions of unlicensed hunting, or the slaughter of cattle in

violation of local slaughterhouse regulations, or cosmetic "docking" of animals' ears or tails. 559 U.S. at 477. Because the statute covered depictions far beyond its supposed purpose, and because the government could offer no constitutional argument justifying the statute's application to those depictions, this Court struck it down as overbroad. *Id.* at 481-482.

If anything, overbreadth is even more obvious in this case. Under the Supreme Court of North Carolina's own reading of the statute, Section 202.5 proscribes a vast universe of expressive activity far removed from any legitimate State interest in stopping predation on minor children. The Constitution prohibits a sweep of that breadth, which proscribes protected speech wholly unrelated to the ostensible purpose motivating the law.[7]

Indeed, this case presents an example of the statute's lack of tailoring: Petitioner broke the law by announcing on Facebook that a local court had dismissed his traffic ticket and by exclaiming that "God is good." North Carolina's prohibition on Petitioner's communication regarding his personal interaction with local authority and his faith in a higher power—and his "accessing" of Facebook in order to proclaim it—has no discernable relationship to the statute's purpose of protecting minor children.

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[7] Section 202.5 is so poorly tailored that it is noticeably *under-inclusive*, leaving unaddressed some types of expression that actually come much closer to its purported justification. For example, Section 202.5 expressly does not prohibit actual communication between those convicted of sexual offenses and minors via email or some single-purpose chat rooms. *See* N.C. Gen. Stat. § 14-202.5(c).

C. Section 202.5 Is Unconstitutional Prophylaxis

Section 202.5's lack of tailoring is by design. The statute takes an improperly "prophylactic" approach—the exact type of approach to speech regulation that this Court has time and again viewed with grave suspicion.

This Court has continually rejected prophylactic laws that target antecedent speech rather than subsequent harm. *See, e.g.*, *Riley*, 487 U.S. at 801 ("'Broad prophylactic rules in the area of free expression are suspect.'" (quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963))); *see also, e.g.*, *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989) (blanket prohibition on indecent but not obscene "dial-a-porn" phone lines violated First Amendment notwithstanding interest in protecting minor children); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 636 (1980) (prohibition on charitable solicitation was overbroad and not justified by fraud prevention); *In re Primus*, 436 U.S. 412, 436-437 (1978) (sweeping prohibition on attorney's client solicitation not justified by state's interest in preventing vexatious litigation); *Button*, 371 U.S. at 439-440 (state's interest in preventing champerty, barratry, and maintenance did not justify prohibition on solicitation by NAACP and public interest lawyers).

Section 202.5 is triply prophylactic. *Cf. McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1458 (2014) (plurality opinion) (striking down aggregate contribution limits where contributions to individual campaigns were already limited, and explaining that "[t]his 'prophylaxis-upon-prophylaxis approach' requires that we be particularly diligent in scrutinizing the law's fit"). First, it covers *all* communication and reading of social media and numerous other sites, not just speech directed to or involving minors. Second, even for speech involving mi-

nors, the law is not targeted at improper speech (such as solicitation), which North Carolina already targets with other laws. *See* N.C. Gen. Stat. § 14-202.1 (criminalizing taking indecent liberties with a child); *id.* § 14-202.3 (criminalizing solicitation of a child by computer or certain other electronic devices). Rather, Section 202.5 criminalizes perfectly innocent conduct, such as reading the public Twitter feed of a 17-year-old celebrity, communicating with a minor relative through Facebook about family matters, or debating religious tenets with a 16-year-old in the comments section of a *New York Times* opinion piece. And Section 202.5 is prophylactic in still a third way, as it applies to the speech of some persons whose initial offenses had nothing whatsoever to do with minors in the first place.

The amount of protected speech covered by Section 202.5 thus far exceeds the statute's legitimate sweep—a mismatch that cannot be justified by the small category of speech that might have been constitutionally proscribed by a properly tailored law. The substantial overbreadth doctrine exists for misguided laws like Section 202.5.

II. Section 202.5 Is Unconstitutionally Vague

Section 202.5 is unconstitutional for another reason: It is impermissibly vague and thus violates the Due Process Clause. In particular, Section 202.5 requires those covered by the statute to determine whether a given website "permits" use by minors, whether in fact or in policy. An ordinary citizen's inability to answer those questions makes it impossible to know in advance what conduct is proscribed and, at the same time, bestows on law enforcement virtually unbounded discretion to arrest and charge citizens for alleged violations.

The Due Process Clause requires more. Especially where First Amendment freedoms are implicated and the risk of chilling protected expression falling outside the statute's purview is high, legislatures must act with the utmost specificity. Yet Section 202.5 lacks the basic specificity required for North Carolinians to determine where the statute's ambit ends and their freedom from criminal prosecution begins.

A. Particularly Where They Implicate First Amendment-Protected Activity, Criminal Laws Must Not Be Vague

Woefully imprecise criminal laws have no place in our constitutional order. Legislation that either "fails to give ordinary people fair notice of the conduct it punishes" or that is "so standardless that it invites arbitrary enforcement" violates the Due Process Clauses of the Fifth and Fourteenth Amendments. *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015).

This bedrock principle applies to all laws, regardless of the nature of the conduct proscribed.[8] But

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[8] The Supreme Court of North Carolina declined to address Petitioner's facial vagueness challenge because his conduct fell "squarely within the scope of the statute." Pet. App. 27a. That was error; vagueness challenges may be asserted by a defendant even where his own conduct is clearly within the challenged statute's ambit, particularly where the statute makes an unrestrained grant of enforcement discretion. *See Johnson*, 135 S. Ct. at 2560-2561 (finding the residual clause of the Armed Career Criminal Act unconstitutionally vague without considering its application to the petitioner, noting that "our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp"); *City of Chicago* v. *Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who

where a state purports to criminalize activity that is protected by the First Amendment, an even "greater degree of specificity" is required to withstand a vagueness challenge. *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974). The heightened specificity requirement in cases implicating the First Amendment is necessary to prevent a chilling effect on protected speech. Vague criminal laws that "abut upon sensitive areas of basic First Amendment freedoms" will invariably require those seeking to comply to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)). Faced with such statutes, people will refrain from speaking rather than risk criminal charges, a loss of First Amendment freedoms that is irrevocable. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

B. An Ordinary Person Cannot Discern The Limits Of Section 202.5

Section 202.5 makes it a crime for certain persons to "access" certain websites "where the [person] knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. § 14-202.5(a). But Section 202.5 does not specify what it means to "permit[]" such conduct, such

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may also be adversely impacted by the statute in question."); *cf. Clark* v. *Martinez*, 543 U.S. 371, 397-398 (2005) (Thomas, J., dissenting) ("[O]ur rules governing third-party challenges ... are more lenient in vagueness cases."). *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 20 (2010), which holds that a plaintiff whose speech is clearly proscribed cannot raise a successful claim under the Due Process Clause of the Fifth Amendment *for lack of notice*, is not to the contrary.

that it is unclear what the knowledge requirement amounts to. An ordinary person confronted with this portion of Section 202.5's text would be unable to determine whether a particular website fell within its proscription, and therefore unable to "intelligently choose, in advance, what course it is lawful for him to pursue." *Connally* v. *General Constr. Co.*, 269 U.S. 385, 393 (1926). That is the essence of unconstitutional vagueness. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972) (holding that laws are unconstitutionally vague unless they provide "the person of ordinary intelligence a reasonable opportunity to know what is prohibited").

How does a person "know" whether a website "permits" participation by minors? The Supreme Court of North Carolina noted the vagueness problems in answering that question, but declined to resolve them beyond suggesting that one might consult the website's terms of use. Pet. App. 17a-18a. But under the literal terms of the statute, the very act of "accessing" a website to read its terms of use could, depending on the predispositions of the investigating officer, be considered a criminal act in itself. *See* N.C. Gen. Stat. § 14-202.5(a). That one might trigger liability by following the state supreme court's dictum on how to avoid liability is a telltale sign of a law that is too vague to be constitutionally enforceable.

Moreover, even if one could consult a website's terms of use without triggering liability under Section 202.5, the answers available are anything but definitive. Some sites have terms of use that are ambiguous or legally complex.[9] Others have multiple public versions of

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[9] *See, e.g.*, Spotify, *Terms and Conditions of Use* (Sept. 9, 2015), https://www.spotify.com/us/legal/end-user-agreement/ (providing

their terms of use which appear to be contradictory on the key question of use by minors.[10]

The incidence of ambiguities and unanswered questions within the terms of use is not particularly surprising. These documents were not drafted by elected officials or legislative committees, nor were they designed as the dividing lines between lawful and criminal activity. But if North Carolina takes the unusual step of allowing a deprivation of its citizens' liberty interests to turn on the usage policies of countless privately operated websites, then those websites' policies become part of the constitutional analysis. And as these examples make clear, they fail the specificity requirements of due process. Someone of ordinary intelligence reading the terms closely would still be hopelessly confused as to

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that users must "be 18 or older, or be 13 or older and have your parent or guardian's consent to the Agreements (except as set forth in [an extensive chart covering age-restrictions in particular countries])" and that additionally users must "have the power to enter a binding contract with us and not be barred from doing so under any applicable laws"); N.Y. Times, *Terms of Service* § 6.1 (Nov. 17. 2015), http://www.nytimes.com/content/help/rights/terms/terms-of-service.html (providing that "[y]ou must be 13 years or older to subscribe to all parts of the Services" but not explaining whether there is any age limit on the site's embedded commenting system and social functions).

[10] *Compare* LinkedIn, *Terms of Service* § B.3 (June 16, 2011), https://www.linkedin.com/static?key=pop%2Fpop_multi_currency_user_agreement&type=sub (appearing to restrict service to those who "represent and warrant" that they are over 18), *with* LinkedIn, *User Agreement* § 2.1 (Oct. 23, 2014), https://www.linkedin.com/legal/user-agreement ("'Minimum Age' means (a) 18 years old for the People's Republic of China, (b) 16 years old for the Netherlands, (c) 14 years old for the United States, Canada, Germany, Spain, Australia and South Korea, and (d) 13 years old for all other countries").

whether many of these sites—some of the most popular sites on the Internet—"permit" use by minors.

Furthermore, even where a site purports clearly to ban use by children under a certain age, these rules are often flouted in practice. A determined child can easily circumvent the existing age-verification systems; as the former chief security officer for MySpace put it, "everybody knows it doesn't really work." Perlroth, *Verifying Ages Online Is a Daunting Task, Even for Experts*, N.Y. Times (June 17, 2012). Similarly, although many of the most popular online dating sites, like OKCupid and Tinder, prohibit use by minors,[11] both websites are manifestly used by—and indeed, are popular among—teens. *See, e.g.*, Conway, *Tinder and 5 More Adult Dating Apps Teens Are Using, Too*, Common Sense Media (Feb. 6, 2016), https://www.commonsensemedia.org/blog/tinder-and-5-more-adult-dating-apps-teens-are-using-too; Quora, *What are some teen dating apps*?, https://www.quora.com/What-are-some-teen-dating-apps (last visited Dec. 22, 2016) ("There are already a lot of teenagers" on OKCupid, and those teenagers "use the app to find dates or connect with other teens in their area."). The popular crowdfunding site Kickstarter also prohibits use by minors,[12] yet high schoolers are no

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[11] OKCupid, *Legal Information* (Dec. 15, 2016), https://www.okcupid.com/legal/terms ("This Website is not intended for children under 18 years of age. If you are under 18, you are not authorized to use this Website and will not be afforded access to any features of this Website that allow for you to provide information to us or to share information with other users of this Website."); Tinder, *Terms of Use* (Sept. 14, 2016), https://www.gotinder.com/terms ("You must be at least 18 years of age to create an account on Tinder and use the Service").

[12] Kickstarter, *Terms of Use* (Oct. 19, 2014), https://www.kickstarter.com/terms-of-use ("To sign up for an account, you need

strangers to it. *See, e.g.*, Hayden, *High School Student Designs Snap-together Cardboard, Kickstarter Now Live*, Road to VR (May 15, 2015), http://www.roadtovr.com/high-school-student-designers-snap-together-cardboard-kickstarter-now-live/; Hintze & VanDuzer, *Start a Business in High School in 7 Steps*, Student Tutor, http://student-tutor.com/blog/start-a-business-in-high-school-in-7-steps/ (last visited Dec. 22, 2016) (encouraging high school students to use Kickstarter to start businesses). Unauthorized underage use of this sort is also prevalent in other areas of the Internet, such as online gaming sites.

It is hardly clear whether a person covered by Section 202.5 can or cannot use such sites. Merely checking their terms of use might reasonably suggest that use by minors is not "permitted," but one who uses them might later be arrested upon learning that the authorities interpreted the statute to include sites that permitted use by minors *de facto*, even if not *de jure*. The other side of the coin is also problematic: Even if most North Carolina officers would not look beyond the terms of use, people subject to the statute could reasonably wish to stay well clear of these websites (and thus forego protected expression) for fear of prosecution based on widely reported actual use by minors. Either scenario runs afoul of the vagueness doctrine.[13]

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to be at least 18 years old, or old enough to form a binding contract where you live. If necessary, we may ask you for proof of age.").

[13] Further questions about the scope of liability under Section 202.5 abound. Is it sufficient to know that a site's terms of use contain some age requirement, as the Supreme Court of North Carolina suggested? If so, how clearly and stringently must such terms be worded? Must there be some knowledge of how the age requirement is enforced, and/or whether it can be or is in fact flouted? Can a defendant be charged with knowledge of usage in fact

Similar concerns about an ambiguous knowledge requirement doomed the statute challenged in *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). That case addressed a Washington statute that barred employment of "subversive person[s]," defined to include "any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises, or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act" designed to overthrow the United States' constitutional democracy. *Id.* at 362. State employees were required to take an oath swearing that they met these requirements. *Id.*

This Court found the oath requirement invalid on vagueness grounds because it failed to specify what a particular oath-maker must know. *Baggett*, 377 U.S. at 369. The Court wondered, for example, whether the subscriber must "know that his aid or teaching [would] be used by another and that the person aided has the requisite guilty intent or is it sufficient that he knows that his aid or teaching would or might be useful to others in the commission of acts intended to overthrow the Government?" *Id.*; *see also Lanzetta* v. *New Jersey*, 306 U.S. 451, 458 (1939) (phrase "known to be a member" impermissibly vague because it was unclear whether actual or reputed membership was meant; "[i]f reputed membership is enough, there is uncertainty

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that is contrary to the terms of use? If so, will any amount of usage by minor children be sufficient to bring a website within the statute's ambit? What about websites where ages are not even listed in users' online profile, such as the commenting systems used by some major newspapers? These multiple indeterminacies compound one another, resulting in an interpretive morass that an ordinary citizen cannot hope to untangle. *Cf. Johnson*, 135 S. Ct. at 2558 (combining indeterminacies "produces more unpredictability and arbitrariness than the Due Process Clause tolerates").

whether that reputation must be general or extend only to some persons"; and "the statute fails to indicate what constitutes membership").[14] The result here should be no different.

Furthermore, by allowing criminal liability to turn on an ambiguous and manipulable standard, Section 202.5 creates a real risk of arbitrary or discriminatory enforcement. Legislatures have long been required to "'establish minimal guidelines to govern law enforcement,'" *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983), for without such guidelines, a statute "confers on police a virtually unrestrained power to arrest and charge persons with a violation," *Lewis* v. *City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring). Delegating the decision whether certain conduct is unlawful to the "policeman on his beat" turns what should be a neutral legal standard into "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Kolender*, 461 U.S. at 360 (quoting *Smith*, 415 U.S. at 575 and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972)); *see also City of Chicago* v. *Morales*, 527 U.S. 41, 47 (1999) (loitering ordinance that proscribed "remain[ing] in any one place with no apparent purpose" struck down). This case—which involves a law that already singles out a disfavored and stigmatized minority, *see infra* Part III—presents the exact same concerns.

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[14] *United States* v. *Williams*, which respondent cited in opposing certiorari, does not resolve this concern. That case held only that where a statute's requirements are "clear," the "mere fact that close cases can be envisioned" does not make the statute void for vagueness. 553 U.S. 285, 305 (2008). It does not address the situation where, as here, a statute's knowledge requirement is itself indeterminate.

Whether a given website's efforts (or lack thereof) in enforcing age requirements mean that it "permits" some uses by minors is utterly vague. Language of "such a standardless sweep" affords North Carolina's officials free rein to "pursue their personal predilections." *Smith*, 415 U.S. at 575. In this context, it creates an environment in which persons are permitted to use the Internet "only at the whim of any police officer." *Papachristou*, 405 U.S. at 170. Due process does not permit such a system.

III. Section 202.5 Impermissibly Targets Speech Based On The Identity Of The Speaker

Even if Section 202.5 could pass muster under this Court's established overbreadth and vagueness standards, it would be unconstitutional for a third, independent reason: It targets speech based on the identity of the speaker. North Carolina's targeting of an unpopular, disfavored group for massive speech suppression runs counter to the original purpose of the First Amendment, and this Court should not tolerate it here any more than it has in other contexts.

A. This Court Has Repeatedly Rejected Laws That Single Out Particular Speakers And Burden Their Expression

It is well established that a State may not burden "a narrow class of disfavored speaker." *Sorrell*, 564 U.S. at 563; *see also, e.g.*, *Citizens United* v. *FEC*, 558 U.S. 310, 340-341 (2010) (depriving "the disadvantaged person or class of the right to use speech" undermines their ability "to establish worth, standing, and respect"); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 232 (1987) (state "cannot justify selective taxation of certain publishers"); *Niemotko* v. *Mary-*

land, 340 U.S. 268, 272 (1951) (denial of park permit to a group of Jehovah's Witnesses because of "dislike for ... the Witnesses" was unconstitutional). Accordingly, this Court has "frequently condemned ... discrimination among different users of the same medium for expression," *Police Dep't of City of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972), and will sometimes subject such speaker-based discrimination to strict scrutiny, *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 658 (1994) (strict scrutiny may apply to regulations reflecting "aversion" to what "disfavored speakers" have to say).

Speech restrictions that target particular speakers "'are all too often simply a means to control content.'" *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2230-2231 (2015). Targeting particular speakers is also a means to target particular viewpoints. *Sorrell*, 564 U.S. at 565 (statute regulating pharmaceutical promoters that was "designed ... to target [particular] speakers and their messages for disfavored treatment" went "'even beyond mere content discrimination, to actual viewpoint discrimination.'" (quoting *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 391 (1992))). That is because a speaker's identity is often bound up with, or even inextricable from, the speaker's viewpoint or the content of his or her speech. *See, e.g.*, *City of Ladue*, 512 U.S. at 56.

That is true in this very case. Petitioner's ability to publicly celebrate beating a traffic ticket in court—and publicly proclaim God's goodness—has particular meaning about his reentry into full and unfettered American life after having served his sentence for his past crime. *Cf. Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-123 (1991) (striking down law that burdened the ability of former offenders to publish books). Conversely, a broad-based speech ban on former offenders, even after they have

served their time, pronounces that the views of former offenders—their thoughts on family life or current events on Facebook, or their search for employment using LinkedIn, to name a few—are less worthy of consideration by the public. Governmental pronouncements about the worthiness of a particular speaker's ideas almost always violate the First Amendment. *See id.* at 124 (Kennedy, J., concurring) ("Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld."); *accord Citizens United*, 558 U.S. at 340.

Given that this Court has refused to allow laws targeting speakers based on their wealth and power, *see Davis* v. *FEC*, 554 U.S. 724, 742 (2008), or even based on their identity as an artificial, non-human entity, *Citizens United*, 558 U.S. at 365, the North Carolina statute cannot pass muster. Here, Section 202.5 targets a class of *politically powerless natural persons*—those who have been convicted of a registrable sexual offense, but have served the sentence the State imposed—from *any* participation in the major fora of social and civic life in the Internet age. On that basis alone, Section 202.5 should be met with extreme suspicion. *Cf. id.* at 373 (Roberts, C.J., concurring) ("The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.").

B. Laws That Target Disfavored Speakers Are Contrary To The Original Purpose Of The Bill Of Rights

This Court's longstanding suspicion of speech restrictions targeting disfavored minorities is firmly grounded in the First Amendment's original purposes.

The tyranny of the majority—the prospect that political majorities would seek to restrict the rights of unpopular minorities—was an abiding concern of the Founders and a critical motivation for the Bill of Rights. *See, e.g.*, *Whitney* v. *California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [the Founders] amended the Constitution so that free speech and assembly should be guaranteed."). Madison advocated for the Bill of Rights by arguing to the First Congress that the proposed amendments would have a "salutary effect against the abuse of power":

> If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Madison, Speech of June 8, 1789, *reprinted in* 5 Kurland & Lerner, *The Founders' Constitution* 20, 27-28 (1987); *cf.* The Federalist No. 51 (Madison); Amar, *The Bill of Rights: Creation and Reconstruction* 128-131 (2008).

Tocqueville identified the same abiding concern, that "the main evil of the present democratic institutions of the United States does not arise ... from their

weakness, but from their irresistible strength." *Democracy in America*, pt. 1, ch. XV (1831). Majoritarianism, he wrote, provides "inadequate securities ... against tyranny." *Id.* And individuals seeking favor or redress from the government must necessarily rely on majoritarian institutions—public opinion, elected legislators and executives, juries, and often elected judges. *Id.* Like Madison, Tocqueville went on to identify the best possible remedy as our republican institutions, including, critically, "a judiciary ... independent of the other two powers." *Id.*

For the disfavored minority that is subjected to the widespread speech ban imposed by Section 202.5, this Court's role could scarcely be more important. As many courts have recognized, harsh, even punitive restrictions on the rights of former offenders are frequently passed by majoritarian institutions. *Cf. Does #1-5* v. *Snyder*, 834 F.3d 696, 705 (6th Cir. 2016) (collecting cases and concluding that certain Michigan restrictions on where registered sex offenders "can live, work, and 'loiter'" were punitive and unconstitutional), *pet. for cert. filed*, No. 16-769 (U.S. Dec. 14, 2016). The legislators passing such sweeping laws targeting those on a list of registered sexual offenders will almost never pay a political price for such a vote; on the contrary, withholding support for such measures will incur substantial political risk. That is why this Court has long recognized its special role in safeguarding the First Amendment rights of unpopular minority groups who have little recourse in the political process. It should embrace that role in this case.

CONCLUSION

The judgment of the Supreme Court of North Carolina should be reversed.

Respectfully submitted.

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AND
BRIEFS

No. 15-1194

In the Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,
v.
STATE OF NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the
Supreme Court of North Carolina

BRIEF FOR COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NORTH CAROLINA

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INTEREST OF *AMICI CURIAE*[*]

The *amici* filing this brief are associations of governments and public officials who know all too well that sex offenders pose serious threats to children. These associations and their members also are all too aware that the internet, smartphones, and social-networking sites have substantially enhanced these threats. And these associations and their members believe that the First Amendment does not stand in the way of reasonable governmental efforts, like North Carolina's, to keep sex offenders from taking advantage of this situation. State and local governments need to be able to respond to these concerns not only in the particular context of social networking but also in other contexts that will arise in the future. These associations are filing this brief to urge the Court to adopt a constitutional framework that shows appropriate deference to the difficult choices governments and their officials make when addressing these problems.

These associations are the following:

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international

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[*] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than these *amici* or their counsel made a monetary contribution to the brief's preparation or submission. The parties have filed blanket consent waivers with the Court consenting to the filing of all *amicus* briefs.

opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

SUMMARY OF ARGUMENT

This Court's review should be marked by respect for North Carolina's good-faith attempt to solve a vexing social problem. Sex offenders have long presented difficulties for state and local governments, but the advent of internet social networking has made things worse. The same lack of maturity that renders juveniles less morally culpable for Eighth Amendment purposes also leaves them susceptible to manipulation by sexual predators on these websites. Social media has become so integral to many young teenagers' identities that, when their vulnerability leads to an encounter with a predator, they may not tell their parents for fear of losing their access to this part of their lives. There is no easy way for state and local governments to address these issues. When they do, this Court should offer appropriate deference in light of the difficult choices involved. That deference should manifest itself in two ways in this case.

A. First, this Court should apply intermediate scrutiny to North Carolina's law, not the strict scrutiny Packingham and his *amici* are advocating. North Carolina's law focuses on a sex offender's conduct, not speech, and it is content-neutral. That reality makes intermediate scrutiny the appropriate standard. The arguments Packingham and his *amici* have offered for strict scrutiny are inconsistent with settled precedent. The breadth of a restriction is relevant to whether it passes intermediate scrutiny, but has no relevance to whether intermediate scrutiny applies as an initial matter. Intermediate scrutiny is not limited to cases in which the need for a time,

place, or manner restriction arises from congestion or incompatible uses of certain spaces. Nor does the fact that North Carolina's law applies only to registered sex offenders trigger strict scrutiny.

B. Second, the Court should defer to the limiting construction of the statute offered by North Carolina, and should resist Packingham and his *amici*'s assertions that the statute must be assumed to have an implausibly broad scope. Packingham's conviction arose from his access to Facebook—conduct that was squarely within the language and intended scope of the statute. The suggestion by Packingham and his *amici* that the statute would bar sex offenders' access to news websites such as nytimes.com, and that it would be a crime to accidentally access a covered site, is inconsistent with the statutory text. North Carolina's representations about its law's limits deserve respect. This Court need not and should not assume that North Carolina courts will give the statute an unnaturally broad scope that would call its constitutionality into question.

ARGUMENT

The First Amendment does not bar governments from stopping sexual predators' use of websites that could facilitate their abuse of children. Packingham and his *amici* demonstrate too little understanding of the reasons governments are acting on this issue, and too little appreciation for the practical difficulties inherent in this task. The balance governments like North Carolina are striking deserves respect and deference, not the skeptical review Packingham and his *amici* are advocating.

Sexual predators pose a vexing threat in the internet age. That has become even more of a reality in more recent times, when smartphones and social networks have become a vital part of many children's identities. Parents once had to worry about predators being present in places like neighborhood parks, school playgrounds, and shopping malls. Now parents have to worry about predators being present, in a virtual sense, in laptops in their children's bedrooms and on phones their teenagers carry with them almost everywhere they go.

Sites like Snapchat, Instagram, and Facebook have become immensely popular among children, and sexual predators have capitalized on this dynamic. Even in 2006, before social-networking sites were as popular as they are now, a "survey of a nationally representative sample of local, state, and federal law enforcement agencies in the United States estimated 503 arrests for sex crimes involving minors" and social-networking sites. Eric J. Chan, Dale E. McNiel, and Renee L. Binder, *Sex Offenders in the Digital Age*, 44 J. AM. ACADEMY PSYCH. & L. 368, 371-72 (2016). These websites "were used" by

sexual predators "to initiate relationships and to communicate with or to disseminate information or pictures of the victims." *Id.* at 372. The media have recounted details about numerous individual incidents in recent years. *See, e.g.*, *Registered Sex Offender Charged with Meeting a 16-Year-Old for Sex*, TAMPA BAY TIMES, Aug. 24, 2015 (noting that authorities determined that a "registered sex offender" had been talking to the victim "through social media for about two weeks and that he knew she was 16"); Martin Evans, *Facebook Sex Predator Jailed and Banned from Using the Site*, THE TELEGRAPH, May 18, 2012 (discussing apprehended "sexual predator, who groomed more than 1,000 girls on Facebook").

This problem admits of no easy solution in light of the victims involved. As the Court has observed in Eighth Amendment cases, "children are different." *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012). "A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults," which may "result in impetuous and ill-considered actions and decisions." *Johnson v. Texas*, 509 U.S. 350, 367 (1993). Juveniles are also "more vulnerable or susceptible to negative influences and outside pressures." *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

The same qualities that make these children less blameworthy for Eighth Amendment purposes make it uniquely easy for predators to take advantage of them on social-networking sites. One agent from a state Bureau of Investigation has explained that children are routinely divulging information about themselves on these sites, and "'[t]here is no real way for parents to monitor it all.'" Byron Acohido, *Sex*

Predators Target Children Using Social Media, USA TODAY, March 1, 2011 (quoting a Special Agent from the Georgia Bureau of Investigation). Predators can learn who the child is, what they value, and, due to global-positioning-system technology, where these children are. *See id.* As that law-enforcement official puts it, predators manipulate this situation and "'approach children who don't think anybody else cares about their problems or wants to spend time with them.'" *Id.* Meanwhile, "most children won't tell a parent about troubling online encounters for fear of getting their technology taken away." *Id.* It thus should come as no surprise that some social-networking sites that allow children to develop profiles, such as Facebook, have barred registered sex offenders from using their services. *See* N.C. Br. 6.

The stakes of this problem are exacerbated by the effect sexual abuse has on a child's psyche. Juveniles are living through "a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Rape in particular can have "a permanent psychological, emotional, and sometimes physical impact on the child." *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008). From the perspective of many state and local governments, these considerations make it insufficient to simply punish child molestation after the fact. It is imperative for governments to stop child rape before it happens, through reasonable measures Packingham and his amici wrongly deride as "prophylactic." CATO Br. 16.

The value our society places on children, and respectful consideration for the practical difficulties associated with protecting them, calls for a careful

approach when reviewing the constitutionality of North Carolina's proposed solution. Doing so is consistent with the way this Court has analyzed similar laws. As this Court has explained, "[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). That reality has led this Court to "sustain[] legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). This Court has "held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity." *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944)). This Court likewise held that the government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *Id.* (citing *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978)). And this Court refused to strike down a ban on child pornography, even while recognizing that some of its applications might have serious artistic value or otherwise be protected by the First Amendment. *See id.* at 773-74.

Similar considerations should lead the Court to reject Packingham's call to facially invalidate North Carolina's law. As explained below, this Court should emphasize two principles in reaching this result. First, this Court should eschew the strict-in-theory, fatal-in-fact review Packingham and his *amici* are proposing, and should apply intermediate scrutiny instead. Second, this Court should decline Packing-

ham's invitation to broadly construe this statute to reach effectively every website on the internet, and should instead defer to North Carolina's representations that the statute reaches only classic social-networking sites like Facebook.

A. Respect for state and local governments calls for deferential review.

Considering the respect due to governments addressing these problems, this Court should review North Carolina's statute under the same intermediate standard that traditionally has governed time, place, and manner restrictions on speech, not the more exacting standard advocated by Packingham and his *amici*. Packingham's argument for strict scrutiny is inconsistent with this Court's precedents, and his approach would deprive state and local governments of effective means of protecting children from sexual predators. Under this Court's First Amendment precedents, laws of this variety are content-neutral restrictions subject to intermediate scrutiny. This standard provides sufficient safeguards for speech while giving governments space to protect their children.

1. This Court's precedents call for intermediate scrutiny.

The first task in the First Amendment analysis is "to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny." *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring). Speech restrictions are subject to the most stringent scrutiny when they are directly based on the content of the speech or, if fa-

cially neutral, adopted or applied as a proxy for regulating content. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). Content-neutral restrictions, such as time, place, or manner restrictions or conduct-based regulations that impose incidental burdens on speech, are subject to intermediate scrutiny. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (stating that the *O'Brien* test for conduct regulations incidentally burdening speech, "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions") (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)).

North Carolina's law is a regulation on conduct that involves speech. Like a law precluding sex offenders from being present at a school or playground, North Carolina's law regulates registered offenders' attempts to access certain places where children may be, in the virtual sense. Like a law precluding sex offenders from being present at a school or playground, North Carolina's statute has only incidental effects on speech that act, at most, as place or manner restrictions. A prosecution under this law does not require consideration of the content of any speech. There is no indication North Carolina intended for this statute to restrict protected speech because North Carolina disagreed with the message. Under this Court's precedents, this law is subject only to intermediate scrutiny.

2. Packingham and his *amici* advance no persuasive argument for strict scrutiny.

It is fitting that Packingham prefaces his argument for strict scrutiny with the disclaimer that it is not necessary for this Court to decide which level of

scrutiny applies. *See* Packingham Br. 35-36. The arguments he makes largely do not touch on the factors that trigger heightened review.

a. This law is content-neutral.

Packingham has not made any coherent showing that North Carolina's law is content-based. It is true that under *Reed*, a statute can be deemed content-based if it requires consideration of speech's content, even though the lawmakers who enacted it did not intend to censor particular kinds of speech. But a conviction under the North Carolina statute does not turn on the content of the speech. It turns on whether offenders have accessed the websites in question. Packingham has not shown that the North Carolina legislature was, through this statute, trying to stop a particular kind of speech.

Nor can Packingham nudge this case toward strict-scrutiny by asserting that this law achieves neutrality in "a constitutionally unsavory way" by "punishing access categorically, before registrants have an opportunity to speak." Packingham Br. 42. That theory, if correct, would abolish the Court's rule requiring intermediate scrutiny of time, place, and manner restrictions. All such restrictions act on a categorical basis, within the proscribed time, manner, or place, before the person has the opportunity to speak. That does not make them prior restraints. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322-23 (2002) (holding that park-permitting regulation was not an improper prior restraint censoring particular subject matter but a "content-neutral time, place, and manner regulation of the use of a public forum").

The precedents Packingham cites for his assertion that North Carolina's law is "constitutionally unsavory" and worthy of strict scrutiny do not support that theory. Two of the decisions Packingham cites addressed content-based, totally prohibitive prior restraints on speech. *See* Packingham Br. 42 (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 722-23 (1931); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 589 (1976) (Brennan, J., concurring in the judgment)). The third decision explicitly did not decide the level of scrutiny and found that the statute was overbroad "regardless of the proper standard." *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987).

Nor are Packingham's *amici* right to suggest that North Carolina's law is viewpoint- and content-based because it effectively "pronounces that the views of former offenders . . . are less worthy of consideration by the public." Cato Br. 28. The North Carolina statute does not prohibit registered offenders from expressing their viewpoints on multiple internet forums. It simply precludes their access to *social networking sites that contain profiles for children*. By doing so, this law does not suggest that those views are "less worthy of consideration by the public." *Id.* It suggests, at most, that giving these offenders access to those websites will endanger children. This is not because of what those offenders may *say*, but what they may *do*. Strict scrutiny of this restriction is neither necessary nor appropriate.

b. The restriction's scope does not determine whether intermediate scrutiny applies.

Packingham also plows new ground when he argues that intermediate scrutiny applies only to regu-

lations that "operate[] on a limited scope." Packingham Br. 37. No authority he cites holds as much, and this Court's precedents make clear that this is not the rule. The scope of a time, place, and manner restriction is relevant to whether it is sufficiently tailored to survive intermediate scrutiny. *See, e.g.*, *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 771–72 (1994). But the threshold determination of whether intermediate scrutiny applies does not depend on whether the regulation's scope is "large." Packingham Br. 37. The critical question on that point is, instead, whether the regulation imposes a time, place, or manner restriction and whether that restriction is content-neutral. *See, e.g.*, *Regan v. Time, Inc.*, 468 U.S. 641, 655–58 (1984) (addressing a federal law prohibiting reproductions of currency and applying strict scrutiny to the content-based portion and the time, place, and manner analysis to the content-neutral portion).

c. Intermediate scrutiny can apply to regulations that are not designed to regulate incompatible activities.

Packingham likewise is asking the Court to make new doctrine when he asserts that regulation of "incompatible activities in public spaces is the *sine qua non* of time, place, or manner" restrictions. Packingham Br. 38. He appears to be basing that assertion on the fact that this Court discussed the concept of incompatible uses in one case that applied intermediate scrutiny: *Grayned v. City of Rockford*, 408 U.S. 104 (1972). But the Court in *Grayned* did not hold that incompatible uses are the "*sine qua non* of time, place, or manner regulations," Packingham Br. 38, and Packingham is ignoring numerous precedents

finding that preventing crime and promoting public safety are proper purposes of these regulations. *See Hill v. Colorado*, 530 U.S. 703, 715 (2000) (recognizing a substantial state interest in "protect[ing] the health and safety of their citizens") (internal quotation marks omitted); *Martin v. City of Struthers*, 319 U.S. 141, 144 (1943) (recognizing "[c]rime prevention" as a proper basis for time, place, and manner regulation). Lower courts have deemed children's safety a legitimate interest for regulations of the sort at issue here. *See Doe v. Prosecutor, Marion Cnty.*, 705 F.3d 694, 698 (C.A.7 2013) (accepting "public safety" and "shielding . . . children from improper sexual communication" as appropriate government interests); *Hobbs v. Cnty. of Westchester*, 397 F.3d 133, 152 (C.A.2 2005) (analyzing the tailoring of a "manner-of-presentation restriction" with the "interest in the safety and welfare of children").

d. Intermediate scrutiny can apply to regulations confined to subsets of speakers.

Packingham has no basis for contending that intermediate scrutiny cannot apply to restrictions that apply to a specific subset of speakers. *See* Packingham Br. 40. That contention is in direct conflict with *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994). There, this Court held that speaker-specific laws are subject to strict scrutiny only "when the legislature's speaker preference reflects a content preference." *Id.* at 658. As this Court stated more recently in *Reed*, "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." 135 S. Ct. at 2230–31. In other words, the fact that a regulation applies only to a subset of speakers is not, by itself, reason to apply strict scru-

tiny. Strict scrutiny is triggered only when, as a result of the regulation's limitation to those speakers, the Court can conclude that the regulation is content-based. Packingham has offered no argument that the North Carolina legislature was expressing a content preference when it limited this regulation to registered offenders.

The cases Packingham and his *amici* cite do not support their assertion that laws applying only to certain subsets of speakers are subject to strict scrutiny. *See* Packingham Br. 40-41. Some of these cases simply state that some laws discriminating against certain classes of people or types of communication can, in context, amount to viewpoint- or content-based discrimination. *See* Packingham Br. 40 (citing *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)); Cato Br. 26-27 (citing *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Niemotko v. Maryland*, 340 U.S. 268 (1951)). Another of Packingham's precedents merely found that a regulation applying to certain subsets of speakers could not satisfy intermediate scrutiny. *See* Packingham Br. 41 (citing *Gr. N. Orleans Broadcasting Assoc. v. United States*, 527 U.S. 173 (1999)). None of these cases overrules *Turner* or otherwise suggests that intermediate scrutiny does not apply here. They at most show that a law's application to a certain subset of speakers can give rise to an inference of viewpoint or content discrimination. As North Carolina has shown, no such inference can arise with respect to this law, and intermediate scrutiny is the lens through which to view the constitutional questions in this case.

B. Respect for state and local governments also calls for deference to North Carolina's limited interpretation of its own statute.

Similar principles of deference and respect should dictate the statutory-interpretation principles against which the Court's analysis should operate. The Court should scrutinize the statute that actually was passed by the North Carolina legislature, as interpreted and enforced by the executive-branch officials who are defending the statute. This Court need not and should not determine the validity of the different statute discussed by Packingham and his *amici*.

Packingham and his *amici* extend North Carolina's statute beyond the bounds that either its language or common sense requires. They assert that the law would have precluded Packingham from reading news articles on news sites like nytimes.com. *See* Packingham Br. 46; Cato Br. 3; EPIC Br. 20. They assert that Packingham would have violated the statute by accidentally accessing a covered site. *See* Cato Br. 9. They assert that reading a social networking website's terms of use—merely to determine whether the website allows children to post profiles there—could violate the statute. *Id.* at 20. They even claim that the statute could make it a crime for a registered sex offender to access a social-networking site that bars children from using it, if children are breaking the rules and using the website anyway. *See id.* at 22-23.

It is telling that Packingham himself was not convicted of doing any of those things. Packingham was convicted after he created his own profile on Facebook, the most popular and well-known social-

networking website in the United States. His activities fell in the heartland of the conduct this statute was intended to reach, and did not implicate the hypotheticals Packingham and his *amici* have trotted out in their brief.

Nor is there any indication that the statute, fairly and authoritatively construed, would reach those hypotheticals. North Carolina has indicated that the statutory term "access" contemplates that the offender actually uses the website. *See* N.C. Br. 28 n. 8. So if the offender accidentally comes upon a site but does not continue to use it, he would not violate the statute. North Carolina has further represented that the statute would apply only to sites that "contain the hallmark of social networking media—the ability to link to the personal pages of other 'friends' on the same site," and thus would not preclude a registered sex offender from accessing a news-oriented site like nytimes.com. N.C. Br. 26-28.

This Court's precedents demand deference to this limiting construction. "Federal courts lack competence to rule definitively on the meaning of state legislation," and "federal courts should hesitate to conclude that '[a State's] Executive Branch does not understand state law.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 & 76 n. 30 (1997) (quoting *Huggins v. Isenbarger*, 798 F.2d 203, 207–210 (C.A.7 1986) (Easterbrook, J., concurring)). This Court's constitutional jurisprudence relies on the presumption that States and local governments act in "good faith" to uphold the Constitution. *Alden v. Maine*, 527 U.S. 706, 755 (1999). These principles require a "cautious approach" when a federal court confronts private litigants' assertions about a state statute's

breadth that are not supported by authoritative state-court decisions and are contrary to interpretations offered by attorneys for the State. *Arizonans for Official English*, 520 U.S. at 77-78.

There is ample textual support for North Carolina's assurances that the statute is more limited than Packingham and his *amici* suggest. In addition to the considerations noted by North Carolina, *see* N.C. Br. 26-30, the fact that the statute describes the websites at issue as "social-networking site[s]" undercuts the *amici*'s claims about the sorts of websites the statute covers. As this Court has noted, "[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition." *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014) (citing *Johnson v. United States*, 559 U.S. 133, 136 (2010)). That principle has particular significance in the light of the claims by Packingham and his *amici* that the statute prohibits registered offenders from accessing websites for "the New York Times, the Washington Post, Politico, Newsweek, or CNN." EPIC Br. 20. No one thinks of those websites as social-networking sites.

Other common interpretive principles cut against the assertions by Packingham's *amici* that this statute has an implausible reach. A good deal of their parade of horribles is eliminated by the statute's requirement that the sex offender "know[]" that the site he is accessing allows children to create profiles. N.C. GEN. STAT. §14-202.5(a). This requirement means that a registered sex offender does not violate the statute merely by "consulting the website's terms

of use" to determine whether minors also have access. Cato Br. 20. Likewise, no reasonable person would read the statute as making it a crime to access a site whose terms of use does not prohibit children to establish profiles or become members—even though some children might circumvent those rules and set up profiles or become members anyway. *See id.* at 22-23. At the very least, the rule of lenity, which "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them," would preclude any prosecution of the sex offender in those circumstances. *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

This Court need not and should not follow the interpretive path proposed by Packingham's *amici*. The polestar in these sorts of cases is caution and prudence, not overhasty assumptions about what a duly enacted law might mean. "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Official English*, 520 U.S. at 79. In the context of another First Amendment challenge to a law protecting children from sexual abuse, this Court declined to "assume" that state courts would "widen the possibly invalid reach of the statute by giving an expansive construction" to its terms. *Ferber*, 458 U.S. at 773. This Court should go that same route here.

***

Governing frequently involves tough choices like the ones North Carolina and other governments are

making here. When governments make these kinds of decisions, balancing First Amendment rights against the need to protect children, judicial review should accommodate all relevant interests. In this case, that accommodation requires intermediate scrutiny rather than strict, and deference to North Carolina's representations about the statute's limited reach. For the reasons North Carolina has offered, application of those principles requires this statute to be sustained.

CONCLUSION

This Court should affirm the judgment of the Supreme Court of North Carolina.

Respectfully submitted,

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Respondent.

On Writ Of Certiorari To The Supreme Court Of North Carolina

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INTEREST OF AMICI CURIAE

Amici[1] the Electronic Frontier Foundation, the Center for Democracy & Technology, and Public Knowledge are nonprofit public interest organizations that work to protect civil liberties in the digital world. Amici advocate for individuals' constitutional rights to freedom of speech and privacy, and promote the public's interest in an open Internet that enables access to knowledge and provides opportunities for expression and democratic participation.

Amici have filed amicus briefs with this Court in numerous cases applying constitutional doctrine to emerging technologies. *See, e.g., Elonis v. United States*, 135 S. Ct. 2001 (2015); *Riley v. California*, 134 S. Ct. 2473 (2014); *Maryland v. King*, 133 S. Ct. 1958 (2013); *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011).

SUMMARY OF ARGUMENT

Twenty years ago, this Court recognized the profoundly important role of Internet communication in fostering the free speech values at the very heart of the First Amendment. *Reno v. ACLU*, 521 U.S. 844 (1997). Even that long ago, *Reno* appreciated the enormous

[1] All parties have consented to the filing of this brief. Amici affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

speech-enhancing potential of the new platform's "vast democratic forums," where:

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Id. at 851-52, 868-69.

The principles and values underlying the Court's decision remain as fundamental today as they were in 1997; the Internet remains "a never-ending worldwide conversation."[2] But the technology has changed dramatically: online social networking has become the platform where much of that conversation now takes place.

That new reality means that NCGS § 14-202.5, by barring a class of citizens (registered sex offenders) from accessing social networking services and other Internet content, bars those citizens from the collective communicative life of the nation. The First Amendment does not permit such a bar.

A. The statutory ban covers virtually the entirety of a vast communicative universe that hosts billions of active users and facilitates the exchange of billions of messages every day. The proscribed social

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[2] *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

networking services are central to enabling myriad First Amendment-protected speech, including political speech, religious speech, and employment-related speech. NCGS § 14-202.5 thus cuts off a large class of people from an immense and important public dialogue.

B. Social networking services are the tip of the iceberg. The language of NCGS § 14-202.5, applied to the specific technologies underlying Internet communication, encompasses an even broader array of Internet resources and activities – such as purchasing a book at Amazon.com, researching a medical condition at WebMD.com, listening to music at Soundcloud.com, looking up basketball scores on ESPN.com, or reading any of the 70 million blogs at wordpress.com.

C. There is no clear relationship between the statutory prohibition and the harm that the state is attempting to prevent. The proffered policy objectives of the statute fall far short of justifying the remarkably broad swath of the Internet banned thereunder.

D. Economic theory further confirms that the statute fails to leave significant alternative channels of speech. Because of strong "network effects" in social networking systems, the small corner of the social networking universe that remains open to registered sex offenders does not provide meaningful alternative communicative opportunities.

ARGUMENT

The Statutory Prohibition at Issue Constitutes an Exceptionally Debilitating Burden on Speech in the Core of First Amendment Protection

The "first step" in First Amendment analysis "is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Stevens*, 559 U.S. 460, 474 (2010) (citation and internal quotation marks omitted). This is so regardless of the applicable level of scrutiny and the degree of "tailoring" required. Determination of the scope of statutory coverage includes the amount and kind of speech that is burdened. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

Because the North Carolina statute expressly targets the use of "social networking" services, it is important to understand the way they operate and the role they play in contemporary communication.

A. The Proscribed Social Networking Services Host a Massive Quantity of Speech

The severity of the First Amendment burden imposed by the North Carolina statute is apparent from the sheer quantity of speech that the law bans. Statistics show that social networking services host an enormous quantity of speech today, speech totally inaccessible to those persons subject to the statute.

In 1997, this Court observed that "the content on the Internet is as diverse as human thought" at a time when the Internet had approximately 9.4 million host computers, 40 million users, and "thousands" of newsgroups where "100,000 new messages are posted each day." *Reno*, 521 U.S. at 851-52. Today, the numbers have grown to over 1 billion hosts, over 3.5 billion users, and over 216 billion e-mail messages sent every day.[3]

Technology has changed considerably in the intervening years. While *Reno* described "chat rooms" and "mail exploders" as the tools of online speech, *id.* at 851, today's online communities instead principally rely on a diverse array of "social networking" services that have emerged since *Reno* was decided. Such services are generally understood to be those Internet-accessible sites that allow individual users to maintain "profiles" with identifying information, to associate with other users, and to share information with others on the site.[4]

The volume of communicative activity taking place on social networking services every day is staggering – especially for such a new technology.[5] Nearly

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[3] *See* Internet Live Stats, *Emails sent in 1 second*, http://www.internetlivestats.com (total number of Internet users and websites); *id.* at http://bit.ly/1kzb4P3 (approximately 2.5 million e-mails sent every second). Unless otherwise specified, all URLs cited herein last accessed on Dec. 20, 2016.

[4] *See* danah boyd and Nicole Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. Computer-Mediated Commc'n 210, 211 (2008), http://bit.ly/1JJ6Gwm.

[5] Although the first social networking sites appeared online as early as 1997, social networking did not become a mainstream

7 in 10 American adults regularly use at least one Internet social networking service.[6] Facebook alone has more than 1.79 billion monthly active users who view more than 8 billion videos every day.[7] Twitter has over 310 million monthly active users, who publish more than 500 million "tweets" each day.[8] Instagram has over 600 million monthly users, who upload over 95 million photos every day.[9] Snapchat has over 100 million daily users who send and watch over 10 billion videos per day.[10] While some courts have permitted the exclusion of registered sex offenders from areas near playgrounds or schoolyards, those exclusions are highly limited to small areas with few people, so that the measure does not "virtually amount to banishment." *See Poe v. Snyder*, 834 F. Supp. 2d 721, 725 (W.D. Mich. 2011). Exclusion from social networking services would be tantamount to "banishment": the 2.14 billion

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technology until the appearance of Friendster, MySpace, and LinkedIn in 2002-03. *See id.*

[6] Shannon Greenwood et al., *Social Media Update 2016*, Pew Res. Ctr. (Nov. 11, 2016), http://pewrsr.ch/2fIeTTY.

[7] Facebook, *Company Info*, https://newsroom.fb.com/company-info/; Jessica Guynn, *Facebook Now Averages 8 Billion Daily Video Views*, USA Today (Nov. 4, 2015), http://usat.ly/2huc6St.

[8] Twitter, *Twitter Usage*, https://about.twitter.com/company; Internet Live Stats, *Twitter Usage Statistics*, http://www.internetlivestats.com/twitter-statistics/.

[9] Julia Boorstein, *Instagram Reaches 600 Million Monthly active users*, CNBC, Dec. 15, 2016, http://cnb.cx/2hWJez6; Dave Lee, *Instagram users top 500 million*, BBC (June 21, 2016), http://bbc.in/28Q8mXp.

[10] Sarah Frier, *Snapchat User 'Stories' Fuel 10 Billion Daily Video Views*, Bloomberg (Apr. 28, 2016), http://bloom.bg/2fB0J6Y.

users of such services are a population larger than six continents, let alone a playground.[11]

NCGS § 14-202.5 banishes registered sex offenders from virtually the entirety of this immense communicative universe. *Each* of the most heavily-used "social networking" sites on the Internet – including Internet giants such as Facebook, YouTube, Twitter, LinkedIn, Pinterest, Google+, Tumblr, Instagram, and Reddit – clearly falls within the statutory prohibition.[12]

Nor does this burden fall exclusively upon the registered sex offenders subject to the statutory ban. The nature of networked communication is such that excluding one category of speakers from the "vast democratic forums" of social networking deprives the *other participants* in those networks of the information, opinions, and other expression that those excluded speakers could provide. Exclusion impoverishes the networks themselves and the public debate occurring there.

This is particularly troubling as to matters of public concern on which registered sex offenders bring a unique perspective, such as sex offender law reform. For example, in 2015 there was a vigorous public

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[11] Statista, *Number of Social Media Users Worldwide from 2010 to 2020 (in billions)*, http://bit.ly/2gRTQQk (listing 2.14 billion social media users worldwide in 2015).

[12] *See* Appendix 1; *see also State v. Packingham*, 368 N.C. 380, 400 (2013) (Hudson, J., dissenting) (listing services).

debate about the wisdom of a measure, ultimately enacted, that would require that the passports of certain registered sex offenders visually and conspicuously display that status.[13] No doubt many people who followed this debate in social media would have wanted to hear the views of the people subjected to this law.

It is difficult to overstate the burden that the statutory exclusion imposes on registrants' ability to engage in a vast range of expressive activities, and the loss to expression that results.

B. Access to Social Networking Services Is Indispensable for Full Participation in the Nation's Communicative Life

The statistics above reveal only a small part of the story. From a First Amendment perspective, speech on social networking services is particularly important in numerous domains, a small sample of which is provided below.

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[13] *See, e.g.*, Editorial, *Do Sex Offenders Deserve a Scarlet Letter on Their Passport?*, L.A. Times (Feb. 3, 2016), http://lat.ms/1S3R21B; Lenore Skenazy, *Government Wants to Brand Sex Offenders on Their Passports*, Reason (Jan. 8, 2016), http://bit.ly/2hNb6qn; Christopher Moraff, *The long arm of sex offender laws – America's broken sex offender policy goes global*, Al Jazeera America (Feb. 8, 2016), http://bit.ly/2hxerfe; David Post, *The yellow star, the scarlet letter and "International Megan's Law,"* Wash. Post (Jan. 6, 2016), http://wapo.st/20JoSxJ; International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 15 (2016).

1. Social Movements and Organization

Political speech and activism are in "the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995). Social networking has become a vital tool for that activism, facilitating organization and participation in political and social movements today.

Many Americans first glimpsed the power of social networking to influence political events when, on December 17, 2010, Mohammed Bouazizi, a Tunisian vegetable merchant, set himself on fire to protest government repression.[14] It was an act of protest that under most circumstances would have gone unnoticed. Tunisia's traditional media outlets were tightly controlled by the government and, indeed, another Tunisian, Abdesslem Trimech, had gone all but unnoticed when he self-immolated in protest earlier that year.[15] But thanks in large measure to sophisticated use of social networking by other young Tunisian activists (and, later, by their counterparts elsewhere in the Middle East and North Africa), Bouazizi's protest sparked a series of political conflagrations known collectively as the Arab Spring that have profoundly affected the region.[16]

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[14] Yasmine Ryan, *How Tunisia's Revolution Began*, Al-Jazeera (Jan. 26, 2011), http://bit.ly/1klLAZu.

[15] *Id.*; John Pollock, *How Tunisian and Egyptian Youth Hijacked the Arab Spring*, MIT Technology Review (Aug. 23, 2011), http://bit.ly/2gVInkK.

[16] *Id.*; Rebecca J. Rosen, *So Was Facebook Responsible for the Arab Spring After All*, The Atlantic (Sept. 3, 2011), http://

In this country, too, online social networking has played an increasingly vital role in movements that are transforming our social and political landscape. Social networking activism began with the organization of protests at World Trade Organization meetings in Seattle in 1999.[17] The phenomenon accelerated in late 2008 as conservative activists from around the country coalesced over various social networking platforms to form the Tea Party movement.[18] Activists also used social networking tools to amplify the Occupy Wall Street movement from several hundred demonstrators in downtown Manhattan to events around the country, often broadcast over services like YouTube, Vimeo, and LiveStream.[19]

Social networking sites have also been a critical means for minority groups to bring attention to issues not adequately covered by traditional media. The Twitter device of a "hashtag" helped make the Black Lives

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theatln.tc/2hZBmgo; *see also* H. Khondker, *Role of the New Media in the Arab Spring*, 8 Globalizations 675 (2011) (discussing social networking's "critical role" in the Arab Spring, "especially in light of the absence of an open media and a civil society").

[17] N. Eltantawy and J.B. Wiest, *Social Media in the Egyptian Revolution: Reconsidering Resource Mobilization Theory*, 5 Int. J. of Commun. 1207, 1207-08 (2011), http://bit.ly/1fi7vZg.

[18] Douglas A. Blackmon et al., *Birth of a Movement*, Wall St. J. (Oct. 29, 2010), http://on.wsj.com/2hZCWio.

[19] Chenda Ngak, *Occupy Wall Street Uses Social Media to Spread Nationwide*, CBS News (Oct. 13, 2011), http://cbsn.ws/2gM2C0L.

Matter movement a national conversation on racial inequality.[20] Likewise, the Standing Rock Sioux used Twitter, Facebook, Instagram, and YouTube to galvanize national support for their protests against the Dakota Access Pipeline and its threat to their drinking water.[21]

Social networking is part of the lifeblood of these movements, and many thousands of others, large and small. Because users can instantaneously communicate with large, geographically diverse followings and because content can sometimes "go viral" and reach enormous audiences, social networking services have become "an effective organizational tool" for "rapid dissemination of political messages," gathering supporters, seeking financial support, and nurturing community cohesion.[22]

Cutting any person off from social networking services, as § 14-202.5 does, cuts that person off from this

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[20] *See* M. De Choudhury et al., *Social Media Participation in an Activist Movement*, presented at: 10th International AAAI Conference on Web and Social Media (May 17-20, 2016), Cologne, Germany, http://bit.ly/2hFHbjZ; Janell Ross, *How Black Lives Matter Moved from a Hashtag to a Real Political Force*, Wash. Post (Aug. 19, 2015), http://wapo.st/2hunNZu.

[21] Matt Petronzio, *How Young Native Americans Built and Sustained the #NoDAPL Movement*, Mashable (Dec. 7, 2016), http://on.mash.to/2gVQi1q.

[22] Archon Fung et al., *Six Models for the Internet + Politics*, 15 Int'l Stud. Rev. 30 (2013); Karine Nahon and Jeff Helmsley, Going Viral 16 (2013).

array of sociopolitical activism. That is a substantial blow to the person's expressive opportunities.

2. Political Campaigns

In the sphere of electoral politics, the impact of social networking has been equally dramatic. The 2008 presidential campaign of Barack Obama brought social networking into the forefront of politics for the first time.[23] Social networking was even more prominent in the 2016 election cycle. Each of the four presidential candidates who received more than 1% of the popular vote had an extensive presence on social networking sites.[24] The eventual victor, President-Elect Donald Trump, was able to gain unprecedented

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[23] *See* David Carr, *How Obama Tapped Into Social Networks' Power*, N.Y. Times (Nov. 9, 2008), http://nyti.ms/1bI439M; Bethany A. Conway et al., *The Rise of Twitter in the Political Campaign: Searching for the Intermedia Agenda-Setting Effects in the Presidential Primary*, 20 J. Computer-Mediated Comm. 363 (2015).

[24] RealClearPolitics, *General Election: Trump vs. Clinton vs. Johnson vs. Stein*, http://bit.ly/2942mJn; Donald J. Trump for President, donaldjtrump.com (linking to campaign Twitter, Facebook, Instagram, and YouTube accounts); Hillary for America, https://www.hillaryclinton.com/ (linking to campaign Facebook, Twitter, Instagram, LinkedIn, Pinterest, YouTube, and Medium accounts); Johnson Weld 2016, https://www.johnsonweld.com/ (linking to campaign Facebook, Twitter, YouTube, Instagram, Google+, LinkedIn, and Pinterest accounts); Jill Stein for President, http://www.jill2016.com/ (linking to campaign Facebook, Twitter, YouTube, and Instagram accounts).

penetration into the electorate through his use of Twitter alone.[25]

Ideas on social networking systems had real effects. More Americans reported relying on social networking for news about the political campaigns, compared to many traditional media sources and candidates' websites, and a plurality of Americans aged 18-29 found social media to be the "most helpful" news source.[26] Social networking not only informed Americans, but also influenced their views: 20% of users reported "modify[ing] their stance on a social or political issue because of material they saw on social media, and 17% say social media has helped to change their views about a specific political candidate."[27]

But more than simply providing a megaphone for candidates, social networking – unlike more traditional media (*e.g.*, print, TV, and radio) – enables a uniquely *interactive*[28] form of communication between voters and candidates, giving the public unprecedented personal access to candidates. In 2007, a presidential debate featured questions asked directly by

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[25] Michael Barbaro, *Pithy, Mean, and Powerful: How Donald Trump Mastered Twitter for 2016*, N.Y. Times (Oct. 5, 2015).

[26] Jeffrey Gottfried et al., *The 2016 Presidential Campaign – a News Event That's Hard to Miss*, Pew Res. Ctr. (Feb. 9, 2016), http://pewrsr.ch/1PAZeEp.

[27] Monica Anderson, *Social Media Causes Some Users to Rethink Their Views on an Issue*, Pew Res. Ctr., FactTank (Nov. 7, 2016), http://pewrsr.ch/2eeWn9t.

[28] John A. Bargh and Katelyn Y.A. McKenna, *The Internet and Social Life*, 55 Annual Review of Psychology 573, 577 (2004).

members of the public via YouTube.[29] By 2016, the role of social networking in political debates had evolved from a novelty to a fully integrated part of the process. Social networking services provided questions to debate moderators, real-time voter reactions during the debates, and data to analyze how voters were affected.[30]

Social networking sites also have lowered the barriers to running for office and increased engagement by voters, including those otherwise left outside the political process. First-time candidates, running without the traditional advantages of incumbency, were able to use social networking to compensate. New research shows that this strategy was successful: new politicians who used Twitter received an outsized boost in donations, especially from citizens who had not donated to politicians before and from those living in areas with low newspaper circulation.[31] The popular site Reddit has also offered the public opportunities to interact with elected officials and candidates for office at

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[29] Katharine Q. Seelye, *New Presidential Debate Site? Clearly YouTube*, N.Y. Times (June 13, 2007), http://nyti.ms/2hKev9T

[30] Commission on Presidential Debates, *Commission on Presidential Debates Announces Social Media, Technology and Voter Education Initiatives* (Sept. 14, 2016) http://bit.ly/2cyqLaZ; David McCabe, *Facebook Will Help Gather Questions for Presidential Debate*, The Hill (Sept. 15, 2016), http://bit.ly/2cpOl8H.

[31] Maria Petrova et al., *Social Media and Political Donations: New Technology and Incumbency Advantage in the United States* 14, 18-19, 22-23 (Working Paper Sept. 8, 2016), https://ssrn.com/abstract=2836323.

all levels, and from across the ideological spectrum, in the site's "Ask Me Anything" forums.[32]

To some people, the content of election speech on social networks has been defensible; to others it has been reprehensible. But without a doubt, that speech was influential. Blocking some people from accessing those networks deprives them of important parts of the marketplace of ideas.

3. Communicating with Government

Social networking has also become a crucial tool for governing. The White House communicates over Facebook, Twitter, YouTube, Google+, Flickr, Slideshare, LinkedIn, Scribd and FourSquare.[33] Governors in all 50 states have Twitter accounts.[34] All 100 members of the U.S. Senate and 434 voting members of the

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[32] *See, e.g.*, Ken Yeung, *Trump Versus Clinton: A Tale of Two Different AMAs*, VentureBeat (Aug. 1, 2016), http://bit.ly/2aNoAQk; Gina Cole, *Seattle City Council Candidates Answer Questions in Reddit 'Ask Me Anything' sessions*, Seattle Times (Oct. 6, 2015) http://bit.ly/2hXPc72; Joe Coscarelli, *Zephyr Teachout on Reddit, Wanting to Be Governor, and Her Running Mate, Tim Wu*, N.Y. Magazine (Aug. 23, 2014), http://nym.ag/2h1DgAV.

[33] The White House, *Social Hub*, https://www.whitehouse.gov/engage/social-hub.

[34] Twitter, *US Governors*, https://twitter.com/gov/lists/us-governors/members?lang=en (providing public list by Twitter Government, containing 49 out of 50 governors, but excluding North Dakota Governor Jack Dalrymple). Gov. Dalrymple's twitter account is available at https://twitter.com/DalrympleforGov?lang=en.

U.S. House of Representatives from the 114th Congress have Twitter accounts.[35] A recent survey of Congressional staffers found that Twitter and Facebook are effective ways for constituents to bring issues to their representatives' attention and to influence their positions.[36]

Americans increasingly rely on social networks for information from government during times of national emergency.[37] The U.S. Department of Homeland Security ("DHS") has had a "Virtual Social Media Working Group" since 2010 and maintains an active presence on all of the major social networking platforms.[38] It uses these platforms to exchange information with the public during national crises. During Hurricane Sandy,

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[35] Twitter, *Members of Congress*, https://twitter.com/cspan/lists/members-of-congress/members?lang=en. (providing public list by C-Span) (only Rep. Sam Farr not listed). Rep. Farr has a Google+ account. https://plus.google.com/+RepSamFarr.

[36] Bradford Fitch and Kathy Goldschmidt, Congressional Management Foundation, *#SocialCongress 2015*, at 12-15 (2015), http://bit.ly/1K8My03.

[37] Fully one-quarter of all Americans (and over half of those under the age of 30) reported receiving information about the 2013 Boston Marathon Bombing via social networking sites. *See* Social Media Working Group Act of 2015, Report of the Committee on Homeland Security and Governmental Affairs, 114 S. Rpt. 145, at 2 (Sept. 21, 2015), http://bit.ly/2gZVFt8.

[38] *See* the DHS "Social Media Directory," at https://www.dhs.gov/social-media-directory, and the DHS pages on Twitter (https://twitter.com/dhsgov), Facebook (https://www.facebook.com/homelandsecurity), Instagram (https://www.dhs.gov/instagram), and Flickr (https://www.dhs.gov/flickr). *See generally* Dina Fine Maron, *How Social Media Is Changing Disaster Response*, Scientific American (June 7, 2013), http://bit.ly/2gQCzp7.

for example, DHS received approximately 20 million Twitter messages and sent messages to more than 300,000 Facebook users and 6 million Twitter users.[39] Members of the public communicate over Instagram with the Transportation Security Administration concerning whether certain items may be carried onto planes.[40] The Centers for Disease Control educates the public on health issues using social media tools, including Facebook, Twitter, YouTube, and Instagram.[41] Emergency management agencies in all 50 states also provide information to the public over Twitter.[42]

Government agencies and officials in North Carolina also rely on social networking sites. Every statewide-elected official, and 167 out of 170 state legislators have Facebook, Twitter, and/or YouTube accounts.[43] The City of Durham, Mr. Packingham's home town, also uses a wide variety of social networking tools, including Facebook, Twitter, YouTube, Flickr, and

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[39] U.S. Dep't of Homeland Sec., *Lessons Learned: Social Media And Hurricane Sandy* (2013), http://bit.ly/2huLsZO; *see also* Sarah Estes Cohen, *Sandy Marked a Shift for Social Media Use in Disasters*, Emergency Mgmt. (Mar. 7, 2013), http://bit.ly/1zvKugc.

[40] *See* Lori Aratani, *TSA Instagram Showcases the Wacky and Weird from Airport Checkpoints*, Wash. Post (Nov. 27, 2016), http://bit.ly/2gMj4OQ.

[41] Centers for Disease Control, *Social Media at CDC*, https://www.cdc.gov/socialmedia/.

[42] Twitter, *State EM Offices*, https://twitter.com/fema/lists/state-em-offices/members?lang=en (providing public list of State Emergency Management agency Twitter accounts by FEMA).

[43] Vote NC, *Current North Carolina Elected Representatives* http://vote-nc.org/Officials.aspx?State=NC&Report=NC.

Instagram.[44] For example, the Durham Police Department provides "alerts and crime prevention and education information" over Facebook and Twitter. The Durham Finance Department uses Twitter to publicize "new bid opportunities." And GoDurham, the city's public transit system, announces scheduling updates and detours via Facebook and Twitter.

Those subject to NCGS § 14-202.5, like Mr. Packingham, cannot access any of those resources – on pain of a felony conviction – to reach elected officials, to find emergency services, to learn about local meetings with officers, to bid on city projects, or even to find out if the bus is running on time.

4. Religious Worship and Fellowship

As Mr. Packingham himself discovered, social networking sites offer new forums to share and practice religious faith.[45] According to the Pew Research Center: "Fully 20% of Americans said they had shared their religious faith on social networking websites or apps (such as Facebook and Twitter) in the past week,

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[44] City of Durham, *Social Media*, http://bit.ly/1IqdXK9.

[45] The Facebook posting that led to Mr. Packingham's arrest read:

> "Man God is Good! How about I got so much favor they dismiss the ticket before court even started. No fine, No court costs, no nothing spent. . . . Praise be to GOD, WOW! Thanks JESUS!"

J.A. 136 (ellipsis in original).

and 46% said they had seen someone else share 'something about their religious faith online.'"[46] Online religious discourse is especially popular among young adults.[47]

Religious congregations and leaders increasingly embrace social media. Pope Francis signed up for Instagram this year, accrued over 1 million followers within 12 hours, and now has 3.4 million followers.[48] An additional 27 million follow his daily Twitter messages.[49] The Dalai Lama has published over 1,200 messages to his 13 million Twitter followers.[50] Islamic scholars also reach out via social media, including Suhaib Webb, an imam whose popular 10-second Snapchat videos address "a wide range of topics from drugs to marriage advice" in an effort to reach young Muslims.[51] The Church of Jesus Christ of Latter-Day Saints uses Facebook, YouTube, and Twitter to reach millions

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[46] Pew Research Center, *Religion and Electronic Media* 1 (Nov. 6, 2014), http://pewrsr.ch/1tPEmyx.

[47] *See* Paul K. McClure, *Faith and Facebook in a Pluralistic Age: The Effects of Social Networking Sites on the Religious Belief of Emerging Adults*, Sociological Perspectives 14 (2016).

[48] Kelsey Dallas, *The Promise of Social Media for Religious Communities*, Deseret News (June 4, 2016), http://bit.ly/2gMh4pA.

[49] *Pope Francis' Followers on Twitter Now Exceed 27 Million*, Vatican Radio (Feb. 18, 2016), http://bit.ly/2gMhn3I.

[50] Dalai Lama, @DalaiLama, https://twitter.com/dalailama.

[51] Zaina Salem, *The Religion of Social Media: When Islam Meets the Web*, The Islamic Monthly (May 16, 2016), http://bit.ly/2huPPDR.

of people, and the church encourages members to proselytize and to engage with each other on social media platforms.[52]

Perhaps most poignantly, congregations use social networking sites to provide spiritual and financial support to those in need. For example, after the June 2016 mass shooting at Pulse nightclub in Orlando, several central Florida churches reached out over social networking sites to offer aid and comfort to the families of the victims, including free funeral services that could be streamed over the Internet to mourners who could not attend.[53]

Research shows that people who engage in "online religious forums" feel more connected to coreligionists, and, as a result, experience "a greater sense of purpose in their own lives and . . . greater trust and faith in others."[54] The North Carolina law denies an entire class of speakers the opportunity to use this unique environment to shape their own religious worldview, to offer and receive from others the benefit of their personal and religious experience, and to achieve that "greater sense of purpose."

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[52] Tad Walch, *How LDS missionaries are using social media to reach an evolving audience*, Deseret News (Apr. 2, 2015), http://bit.ly/2gWj5Tr.

[53] Bethany Rodgers, *Churches Willing to Hold Free Funeral Services for Shooting Victims*, Orlando Sentinel (June 14, 2016), http://bit.ly/2h00XoE.

[54] Katelyn Y.A. McKenna and Kelly J. West, *Give Me That Online-Time religion: The Role of the Internet in Spiritual Life*, 23 Computers in Human Behavior 942, 953 (2007).

5. Employment

Social networking permeates virtually every aspect of the working lives of millions of Americans, from finding a job, to connecting with colleagues and customers, to locating resources necessary for job performance.

Of the 7 out of 10 Americans who use social networking services, 35% used those services to look for a job, 34% used them to inform friends about available jobs, 21% applied for a job found through social networking, and 13% used them to post information that helped them get a job.[55] The professional social networking site LinkedIn has 467 million members,[56] and is the eleventh most visited website in the United States.[57]

Job performance increasingly depends on access to social networking resources. Today's workers incorporate social networking into a wide range of activities, from building and strengthening relationships with coworkers, to obtaining work-related information from

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[55] Aaron Smith, *Searching for Work in the Digital Era, Part 2: Job Seeking in the Era of Smartphones and Social Media*, Pew Res. Ctr. (Nov. 19, 2015), http://pewrsr.ch/2hnnDjz.

[56] Ian Mills, *4 Reasons You Need to Be on LinkedIn*, Huffington Post (Nov. 21, 2016), http://huff.to/2gWxe4M.

[57] Alexa, *Top Sites in United States*, http://www.alexa.com/topsites/countries/US.

professional colleagues working elsewhere, to contacting experts in their fields for advice and counsel.[58] On Twitter alone there are thousands of different weekly or monthly "chats," at which high school athletic directors, arborists, event planners, software engineers, and nurse practitioners among countless others from around the globe can gather to discuss issues arising in their daily work.[59] Sites like Monster.com, Beyond.com and AngelList.com serve the professional networking needs of workers across diverse industries and job categories.[60] Other, more specialized social networking sites bring together focused groups such as physicians, information technology professionals, education professionals, military personnel, and scientific researchers.[61]

People banned from social networking simply cannot adequately perform many jobs in the 21st century

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[58] *See* Kenneth Olmstead, Cliff Lampe and Nicole B. Ellison, *Social Media and the Workplace*, Pew Res. Ctr. (June 22, 2016), http://pewrsr.ch/28OB2Qt.

[59] *See* TweetReports, *Twitter Chat Schedule*, http://tweetreports.com/twitter-chat-schedule/ (#ADChatsHS, @CaseSports, #TreeChat, @Coronatools, #EventProfs, @readytospark, #UtestChat, @utest, #ARPN, @pyramidmedicine). *See generally Education Chats*, http://bit.ly/1x3luPT (listing hundreds of education-related Twitter chats).

[60] *See* Alex Konrad, *AngelList Acquires Popular Tech Discovery Site Product Hunt to Go After Startup Jobs Search*, Forbes (Dec. 1, 2016), http://bit.ly/2gWBuiV; Monster, "About Us," https://www.monster.com/about/; Beyond, The Career Network, http://www.beyond.com.

[61] Hannah Kuchler, *Vertical Dimensions to Social Networking*, Financial Times (Oct. 30, 2014), http://on.ft.com/2gWICOb.

economy. Most obviously, jobs at social networking service providers are off-limits if they require any contact with the company's website. Moreover, many thousands of businesses use online social networks for marketing, collaboration among employees, managing procurement, and receiving customer queries and complaints.[62] The packaged goods, financial services, professional services, and advanced manufacturing sectors alone may enjoy an estimated $900 billion to $1.3 trillion in value "through use of social technologies."[63] With such overwhelming financial incentives to integrate social networking pervasively into industry, the number, variety, and quality of jobs available to people excluded from social networking sites is likely to decrease.

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These examples could be multiplied without end. There are few areas of modern life in which social networking services do not occupy an increasingly necessary position. It is difficult to imagine full and robust participation in the civic life of this country without access to the tools these services provide.

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[62] Michael Chui et al., *The Social Economy: Unlocking Value and Productivity Through Social Technologies*, McKinsey Global Institute 2-4 (July 2012), http://www.mckinsey.com/industries/high-tech/our-insights/the-social-economy.

[63] *Id.* at 3, 9.

C. The Statutory Prohibition Reaches Many Internet Sites Outside of the "Social Networking" Category

A prohibition on accessing just the major social networking sites would itself be severely damaging to expressive activities, but the statutory prohibition at issue here sweeps much more broadly.

As the dissent below correctly observed, in addition to sites like Facebook, Google+, LinkedIn, Instagram, and Reddit:

> [T]he statute also likely includes sites like Foodnetwork.com, and even news sites like the websites for The New York Times and North Carolina's own News & Observer. Most strikingly, the statute may even bar all registered offenders from visiting the sites of Internet giants like Amazon and Google.

Packingham, 368 N.C. at 400 (Hudson, J.).

Three features of the statutory language are especially important to an understanding of the ban's breadth.

1. The Criteria for Prohibited Sites

The statute prohibits access to websites that provide certain basic social networking functionality, even if the site's content and services are far outside the scope of those web sites that are commonly thought of as "social networking web sites."

Spurred on by the success of the major social networking sites described above, many Internet websites, offering a diverse array of information, services, or goods for sale across the entire spectrum of the Internet economy, offer social networking tools to attract and retain users and to create a sense of community among them. For example, many commercial websites allow users to post reviews of products or services, to post queries about website offerings, and to respond to other users' ratings and queries.[64] Indeed, any commercial website[65] that allows access to minors and permits users to post comments under their own name or nickname[66] that other users may see and respond to[67] in order to exchange information about an article, product, or service,[68] could fall within the statutory ambit.

Although popular social networking sites may permit users to create more detailed profiles or provide more sophisticated communication mechanisms, the

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[64] *See, e.g.*, Amazon, Amazon.com Community Guidelines, http://amzn.to/2dpw6DK ("The Amazon Community provides various forums for engaging other users and sharing authentic feedback about products and services – positive or negative.").

[65] NCGS § 14-202.5(b)(1) ("derives revenue from . . . sources related to the operation of the Web site").

[66] NCGS § 14-202.5(b)(3) ("Allows users to create . . . personal profiles that contain information such as the name or nickname of the user").

[67] NCGS § 14-202.5(b)(2) (facilitates "social introduction" or "information exchanges" between two or more people).

[68] NCGS § 14-202.5(b)(4) ("Provides users . . . mechanisms to communicate with other users, such as a message board").

ability to exchange information with other users on a website using one's name, nickname, photograph, or other personal information constitutes a minimal level of "social networking capabilities" that may bring many commercial sites within the sweep of NCGS § 14-202.5.[69]

For example, the Disqus system for accepting and publishing comments is used on millions of websites, ranging from top news outlets like *Politico* and *The Atlantic*, to personal journals like that of two retail fanatics, CostcoCouple.com.[70] Any website using that comment system might well be a prohibited site under NCGS § 14-202.5.[71]

As a result, the statutory access prohibition covers websites which are not ordinarily considered to be engaged in "social networking." A representative sampling of such sites – each of which appears to meet the

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[69] This definition of "social networking capabilities" is applied in Appendix 1.

[70] Disqus, *Disqus Directory*, http://bit.ly/2i7YVHT (providing partial listing of sites that have used Disqus' comment tool); Adriana Lee, *Disqus' Daniel Ha: Writing the Future of Comments*, ReadWrite (Nov. 25, 2013), http://bit.ly/2gQGP8k.

[71] Disqus permits websites to earn revenue from advertising via the comment system, *see* Anna Heim, *Disqus Serves 5 Billion Ads Per Month, Keeps on Expanding Promoted Discovery*, The Next Web (Dec. 19, 2012), http://bit.ly/2h0Pdp8; facilitates introduction of people via features for "following" individual users, *see* Jason Kincaid, *Now You Can Follow Other Commenters on Disqus*, TechCrunch (Dec. 16, 2010), http://tcrn.ch/2hhd7dI; provides for creation of personal profiles, *see id.*; and, by definition, offers mechanisms for users to communicate with other users.

statutory definition of a prohibited "commercial social networking Web site," *see* Appendix 2 – would include:

Search engines: Google, Bing, Yahoo

News and Opinion: Raleigh News and Observer, New York Times, Washington Post, Slate

Politics: Politico, Fox News, The Atlantic

Sports: Yahoo Sports, ESPN, Bleacher Report

Blogs: Wordpress, Quora, Blogspot, Blogger

Retailers: Amazon, Walmart, Target, Macy's

Music: Pandora, Soundcloud, Rolling Stone

Health: WebMD

Travel: TripAdvisor

2. The Prohibition on "Access"

It is a felony for a registered sex offender to "access," for *any purpose whatsoever*, any website that falls within the statutory ban. That is, if a website falls into the category of access-prohibited sites, any access *to the site* – *e.g.*, reading or downloading any documents posted there, triggers criminal penalties. This is true whether or not the social networking functions were accessed or used (let alone used for any improper purpose).

As a consequence, shopping for a gift on a Macy's wedding registry, perusing hotel reviews on TripAdvisor, or filling out a March Madness bracket on Yahoo Sports, may all be prohibited.

Furthermore, Internet technology allows for one web page to "embed" another web page, such that a user accessing the first web page automatically accesses the second. Website operators regularly embed social networking services' features into their own web pages.[72] This possibility of embedding means that the statute may prohibit accessing a website that otherwise might not fall within the statutory prohibition.

3. Application to "Web Sites" Generally

The North Carolina statutory scheme prohibits access to "Internet Web site[s]" that meet the requirements set forth in § 14-202.5(b). "Web site," however, is not expressly defined. Its ordinary meaning,[73] at least in this context, is not sufficiently precise[74] to enable

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[72] *See, e.g.*, Mat Honan, *Embedded Posts: This Is Facebook's Real Public Offering*, WIRED (July 31, 2013), http://bit.ly/2hhg9Pc.

[73] The American Heritage Dictionary defines "website" as a "set of interconnected webpages, usually including a homepage, generally located on the same server, and prepared and maintained as a collection of information by a person, group, or organization." "Website," American Heritage Dictionary http://bit.ly/2h9Z7oy (Dec. 20, 2016).

[74] Statutes impinging on core First Amendment interests through the imposition of criminal penalties must satisfy a particularly high standard of precision. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2309-10 (2012).

those subject to the prohibition to conform their behavior to the statutory norm, because the boundaries *between* "Web sites" are not certain. Specifically, two questions arise: first, whether multiple services run by a single entity constitute a single "Web site"; and second, whether all content maintained by a hosting service is a single "Web site."

1. Often a single Internet company will operate multiple, independent services. Google, for example, offers a search service at www.google.com, an e-mail service at mail.google.com, a translation service at translate.google.com/, a "news aggregator" at news.google.com, a scholarly research tool at scholar.google.com, a shopping site at www.google.com/shopping, and a photo storage service at photos.google.com.

Under a reasonable reading of the statutory language, this entire collection of interconnected web pages constitutes the singular "Google Web site." And because some of the services offered at the "Google Web site" – Google+, for instance – provide social networking functionality and permit minors to become members,[75] it is possible that the *entire collection of services* offered at the "Google Web site" is off-limits to registered sex offenders. Notably, this population would lose access to some of the most popular e-mail platforms on the Internet because they are integrated into larger

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[75] Google, *Get Started with the New Google+*, http://bit.ly/1OAKth3 (describing social networking functions); Google, *Accounts Help*, http://bit.ly/1rqpW7W (Google permits users 13 years and older to have accounts).

suites of online services from Google, Microsoft, or Yahoo.

2. When a single hosting service includes some web pages that have social networking functionality and others that do not, the definitional problem with "Web site" extends even further. Wordpress, for example, is one of the largest blogging platforms on the Internet, allowing users to create their own web pages and blogs, all served under the domain name "wordpress.com." Wordpress serves over 74 million different pages, some of which include "social networking" functionality and some of which do not.[76]

Since all of these websites have an address within "wordpress.com," § 14-202.5 may treat them all as within this one "Web site." This would potentially proscribe content far outside any reasonable statutory intent. One group, for example, created a Wordpress blog solely to publish an open letter to a U.S. senator.[77] The blog contains only one page, with nothing but political advocacy on it, and yet that blog may be considered part of a forbidden "commercial social networking service."

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[76] ManageWP, *14 Surprising Statistics About WordPress Usage*, http://bit.ly/MaYMzp. (Feb. 7, 2014).

[77] Alan Krueger et al., *An Open Letter from Past CEA Chairs to Senator Sanders and Professor Gerald Friedman*, WordPress, https://lettertosanders.wordpress.com/ (Feb. 17, 2016).

D. The Statute Is Not Well Tailored to Address the Problem to Which It Is Directed

The broad range of expression blocked by § 14-202.5 suggests that the statute is not properly tailored to the relevant problem. North Carolina asserts that the statutory prohibition serves the purpose of "prevent[ing] registered sex offenders from prowling on social media and gathering information about potential child targets." *Packingham*, 368 N.C. at 388.

It goes without saying that protecting minors against those who would perpetrate sexual violence against them is a compelling government interest of paramount importance. But prohibiting access to all social networking because some individuals could possibly obtain information that could then be used to perpetrate criminal acts surely "burns down the house to roast the pig." *Reno*, 521 U.S. at 882.

In *Reno*, faced with a ban on posting sexually explicit content on the Internet, the Court noted that while such content was "widely available," users "seldom encounter such material accidentally," because "[u]nlike communications received by radio or television, the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial." *Id.* at 854. Similarly, social networking services are not designed to make it easy for sex offenders to discover minors. Indeed, many of those services implement privacy options and safeguards that reduce the likelihood of

undesirable encounters with minors.[78] *Cf. Reno*, 521 U.S. at 854-55 (emphasizing the "[s]ystems [that] have been developed to help parents control the material that may be available on a home computer with Internet access").

A determined criminal might be able to find ways to take advantage of social networking services to inappropriate ends, but the proper recourse to prevent undesirable conduct is to prohibit the conduct that is undesirable – without prohibiting expressive activity protected by the First Amendment. In *Schneider v. State*, the Court rejected municipal regulations prohibiting the distribution of flyers without a license because the regulations were not narrowly tailored to further the government's interest in preventing

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[78] *See, e.g.*, Facebook, *Profile & Timeline Privacy*, http://bit.ly/2hYbIwz; Facebook, *Control Who Can See What You Share*, http://bit.ly/2i5Gboe. These privacy features are common among traditional social networking sites. *See, e.g.*, Instagram, Privacy Settings and Information, http://bit.ly/2hRUpdE (Instagram privacy settings allowing users to limit who can see their photos and videos, who can comment on their posts, and who can see their profile); Instagram, How Do I block or Unblock Someone, http://bit.ly/2hpt7dL; *see also* Twitter, About Public and Protected Tweets, http://bit.ly/1ht6UCO (Twitter privacy setting allowing users to limit who can view their tweets and providing instructions for blocking other account holders); *see also* Google+, Settings, http://bit.ly/1ktHEDc (Google+ privacy settings allowing users to limit who can see posts, who can comment on posts, and who can send notifications); *see also* Google+, Block Someone – Google+ Help, https://support.google.com/plus/answer/1047934?hl=en (describing how to stop other account holders from contacting you or viewing your content).

littering. 308 U.S. 147, 162 (1939). The ordinances unreasonably restricted speech, punishing distributors of flyers even where the distributors did not, themselves, litter. *Id.* As the Court aptly noted, "[t]here are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." *Id.*

Likewise, *McCullen v. Coakley* struck down a Massachusetts law criminalizing standing in a public walkway within 35 feet of abortion facilities because the law was not narrowly tailored to serve the government's interest in combating obstruction of abortion clinics. 134 S. Ct. 2518, 2541 (2014). Though Massachusetts asserted "undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities," banning access to public walkways was an "extreme step" that closed substantial portions of public forums to all speakers. *Id.* Massachusetts failed to use "less intrusive tools" or "consider[] different methods that other jurisdictions have found effective," including anti-harassment and anti-obstruction statutes that would more directly address the state's interests without severely restricting speech. *Id.* at 2539.

But the laws challenged in *McCullen* and *Schneider* seem narrowly tailored when compared to § 14-202.5, which goes far beyond protecting minors from sexual violence. North Carolina's prohibition broadly bans online speech and access to critical websites with no regard for whether that speech, or the activities

conducted on those websites, endanger or even involve minors. The practical effect is to bar registered sex offenders not merely from the school, the playground, and even the town square, but from entire regions of the country where their fellow citizens are gathered for the purpose of information exchange about any and all subjects of human inquiry.

Nor are the statutory exceptions well-tailored to the statutory goals. The statute provides that a website falls outside the access prohibition if it:

> (1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or
>
> (2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

NCGS § 14-202.5(c).

It is unclear why a site that provides only "chat room" or "message board" functionality, or a site whose primary purpose is facilitation of commercial transactions between members, poses any less risk of information "harvesting" than other sites. In addition, websites that provide single discrete services have generally given way to the popular integrated suites of services provided by Google, Microsoft, Amazon, Facebook, and Yahoo!, among others.[79] This increasingly

[79] *See* Appendix 1.

integrated functionality also makes the "primary purpose" requirement of the second exception too vague to permit criminal liability. A person subject to the statute should not have to risk a felony conviction based upon a "guess" of the primary purpose of a site such as eBay, let alone one such as Amazon or Google. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). The combination of the law's vagueness and its grave sanction could have such a chilling effect as to effectively exclude subject persons from the Internet altogether.

E. Alternative Channels Cannot Replace the Power of the Services to Which the Statute Bars Access

The court below asserted that "the Web offers numerous alternatives that provide the same or similar services" as prohibited sites.[80] That assertion dramatically understates the communicative burdens imposed by the statutory prohibition.

To be sure, there may be social networking websites that fall outside of the statute's reach, either because they are entirely non-commercial or because their terms of service prohibit minors from accessing the site. But this category of access-permitted sites

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[80] *Packingham*, 368 N.C. at 390. The court identified four such sites: the Paula Deen Network (http://www.pauladeen.com), the news and opinion website at WRAL.com, the employment site at Glassdoor.com, and the photo-sharing site at shutterfly.com.

includes *none* of the largest and most widely used social networking sites.[81] And for social networking, size matters: owing to well-known "network effects," smaller social networking sites are not meaningful alternatives to larger sites, even if they provide technically equivalent functionality.

A "network effect" is an economic phenomenon in which a good or service becomes more valuable as more people use it. A telephone or fax network is the classic example; as more people join, the network becomes increasingly valuable to each user.[82] By one commonly used measure, the value of a network varies roughly in proportion to the *square* of the number of users; a system that is smaller than another by tenfold is about 100 times less valuable, and one that is a thousand times smaller is diminished in value by a factor of a million.[83]

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[81] *See* Appendix 1.

[82] *See* Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. Econ. Persp. 93, 96 (1994); David G. Post, *In Search of Jefferson's Moose: Notes on the State of Cyberspace*, 47-59 (2009) (comparing Internet network effects to development of early U.S. canal transport systems).

[83] This is known as Metcalfe's Law. *See* George Gilder, *Metcalfe's Law and Legacy*, Forbes ASAP (Sept. 13, 1993), at S158; Xing-Zhou Zhang et al., *Tencent and Facebook Data Validate Metcalfe's Law*, 30 J. Computer Sci. & Tech. 246 (2015). Intuitively, the explanation of the law is that the value that one derives from a networked system is proportional to the number of conversations on the system, and in a system of n users there can be n^2 conversations.

Social networking services, unsurprisingly, exhibit strong network effects. Because those services enable users to communicate with other users, they rapidly increase in usefulness as more people join.[84] New users choosing between two services will, all other things being equal, lean toward the one with more users. Thus, a service's early advantage in user base tends to snowball into greater dominance in the market, an effect scholars call "tipping."[85]

Once a social networking service achieves a sufficiently large user base, users already on the service will be strongly discouraged from switching to another service – those users are, in a sense, locked in.[86] This further burdens those attempting to access a desired audience through an alternative, smaller social networking system. Individuals subject to the statutory

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[84] *See, e.g.*, Kuan-Yu Lin & Hsi-Peng Lu, *Why People Use Social Networking Sites: An Empirical Study Integrating Network Externalities and Motivation Theory*, 27 Computers in Human Behavior 1152, 1158 fig.2 (2011).

[85] Katz & Shapiro, *supra*, at 105-06 (defining tipping as "the tendency of one system to pull away from its rivals in popularity once it has gained an initial edge"); *see also* Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 Cal. L. Rev. 479, 496-97 (1998).

[86] *See United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 20 (D.D.C. 1999); *see also* Lemley & McGowan, *supra*, at 592.

While users may join multiple social networking services, they generally do not devote equal attention to every service. Network effects mean that, given a limited amount of time to read and post content, a user will tend to allocate time to the services with the largest audiences.

prohibition who wish to network with friends and family who are Facebook users, for example, can do so only if those friends or family join some alternative system. Because network effects heighten the cost of switching to alternative social networks, those friends or family are unlikely to do so.

Restricting subject persons from accessing the most widely used social networking sites substantially decreases the value of their speech. The North Carolina Supreme Court recognized this but thought that the deficiency could be compensated, since the statute permitted access to the recipe-sharing site of a celebrity chef, the Paula Deen Network. *Packingham*, 368 N.C. at 390.

Whether one is attempting to organize a bake sale or a political movement, the Paula Deen Network is not a meaningful alternative to Facebook or Instagram. The economic theory of network effects dictates this, but so does common sense. The tiny corner of the Internet left open by § 14-202.5 bears no comparison to the vast bazaar of ideas and expression on social networks today. The First Amendment does not tolerate governments shunting a class of people off to that tiny corner. The statute should be held unconstitutional.

CONCLUSION

The judgment of the Supreme Court of North Carolina should be reversed.

Respectfully submitted,

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APPENDIX 1

TOP 25 WEBSITES IN THE UNITED STATES[1] (November 18, 2016 – December 18, 2016)

Google

Site Traffic[2] (Rank): 167.81 Million (1)

Site Permits Minors: Yes
(http://bit.ly/1rqpW7W)

Derives Revenue from Operation of Site: Yes
(http://bit.ly/2hRBIHa)

Site Has Social Networking Capabilities[3]: Yes
(https://www.google.com/intl/en/policies/privacy/)
(http://bit.ly/2hp9hza)

YouTube

Site Traffic (Rank): 114.23 Million (2)

Site Permits Minors: Yes
(http://bit.ly/1tZwVVe)

Derives Revenue from Operation of Site: Yes
(http://bit.ly/1wJ1a5M)

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[1] Rankings are from Alexa.com, an internet tracking service for website traffic data. *See, e.g., Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1222 (9th Cir. 2011). Alexa site rankings are calculated by combining the average number of daily visitors to a website with the number of pageviews that take place on that site over the course of a month. *See* http://www.alexa.com/topsites.

[2] Reflects estimated unique monthly visitors.

[3] *See supra* Part C.1 (defining minimum level of "social networking capabilities" potentially sufficient to bring web sites within class prohibited by NCGS §14.202-5 to consist of "the ability to exchange information with other users on a website using one's name, nickname, photograph, or other personal information").

Site Has Social Networking Capabilities: Yes (http://bit.ly/1WRwSqw) (http://bit.ly/291dZid)

Facebook

Site Traffic (Rank): 90.28 Million (3)

Site Permits Minors: Yes (https://www.facebook.com/terms)

Derives Revenue from Operation of Site: Yes (https://www.facebook.com/about/basics/facebook-and-advertising/)

Site Has Social Networking Capabilities: Yes (https://www.facebook.com/about/basics/what-others-see-about-you/) (https://www.facebook.com/about/basics/how-others-interact-with-you/)

Amazon

Site Traffic (Rank): 88.70 Million (4)

Site Permits Minors: Yes (http://amzn.to/1Vu2W68)

Derives Revenue from Operation of Site: Yes (http://amzn.to/2hpfn2p)

Site Has Social Networking Capabilities: Yes (http://amzn.to/2fwU3YS) (http://amzn.to/2i5AqT)

Yahoo!

Site Traffic (Rank): 71.75 Million (5)

Site Permits Minors: Yes (https://policies.yahoo.com/us/en/yahoo/terms/utos/)

Derives Revenue from Operation of Site: Yes (https://advertising.yahoo.com/)

Site Has Social Networking Capabilities: Yes
(https://messenger.yahoo.com/)
(http://bit.ly/2hRJzUS)

Wikipedia

Site Traffic (Rank): 70.25 Million (6)

Site Permits Minors: No
(https://wikimediafoundation.org/wiki/Terms_of_Use)

Derives Revenue from Operation of Site: No
(https://wikimediafoundation.org/wiki/FAQ/en)

Site Has Social Networking Capabilities: Yes
(http://bit.ly/25KwyCk)

Reddit

Site Traffic (Rank): 51.28 Million (7)

Site Permits Minors: Yes
(https://www.reddit.com/help/useragreement)

Derives Revenue from Operation of Site: Yes
(https://www.reddit.com/advertising/)

Site Has Social Networking Capabilities: Yes
(https://www.reddit.com/wiki/messaging)

eBay

Site Traffic (Rank): 49.56 Million (8)

Site Permits Minors: No
(http://ebay.to/1dHAoCY)

Derives Revenue from Operation of Site: Yes
(http://pages.ebay.com/help/sell/classified.html)

Site Has Social Networking Capabilities: Yes
(http://pages.ebay.com/help/account/my-ebay.html
#messages)

Twitter

Site Traffic (Rank): 67.44 Million (9)

Site Permits Minors: Yes
(https://twitter.com/tos?lang=en)

Derives Revenue from Operation of Site: Yes
(https://business.twitter.com/en/advertising.html)

Site Has Social Networking Capabilities: Yes
(https://about.twitter.com/directmessages)
(https://support.twitter.com/articles/127871)

LinkedIn

Site Traffic (Rank): 55.53 Million (10)

Site Permits Minors: Yes
(http://bit.ly/P8YEBK)

Derives Revenue from Operation of Site: Yes
(http://bit.ly/2flEWK6)

Site Has Social Networking Capabilities: Yes
(http://bit.ly/2hYddaW)

Netflix

Site Traffic (Rank): 63.59 Million (11)

Site Permits Minors: Yes
(http://nflx.it/1RL0Tnr)

Derives Revenue from Operation of Site: Yes
(http://nflx.it/1RL0Tnr)

Site Has Social Networking Capabilities: No
(https://help.netflix.com/en/node/9977)

Instagram

Site Traffic (Rank): 50.27 Million (12)

Site Permits Minors: Yes
(https://help.instagram.com/478745558852511)

Derives Revenue from Operation of Site: Yes
(https://business.instagram.com/advertising)

Site Has Social Networking Capabilities: Yes
(https://help.instagram.com/684926628219030)

Imgur

Site Traffic (Rank): 37.73 Million (13)

Site Permits Minors: Yes
(http://imgur.com/tos)

Derives Revenue from Operation of Site: Yes
(http://imgur.com/privacy)

Site Has Social Networking Capabilities: Yes
(http://bit.ly/2h06ZW2) (http://bit.ly/2hFFYeD)

Live

Site Traffic (Rank): 38.75 Million (14)

Site Permits Minors: Yes
(http://bit.ly/1KoLjB1)

Derives Revenue from Operation of Site: Yes
(https://privacy.microsoft.com/en-us/privacy statement)

Site Has Social Networking Capabilities: Yes
(http://bit.ly/2hRH2Kr)

Craigslist

Site Traffic (Rank): 36.51 Million (15)

Site Permits Minors: No
(http://bit.ly/2hanMLh)

Derives Revenue from Operation of Site: Yes
(https://www.craigslist.org/about/help/posting_fees)

Site Has Social Networking Capabilities: Yes
(https://www.craigslist.org/about/help/email-relay)

Bing

Site Traffic (Rank): 35.00 Million (16)

Site Permits Minors: Yes
(http://bit.ly/1KoLjB1)

Derives Revenue from Operation of Site: Yes
(https://privacy.microsoft.com/en-us/privacy statement)

Site Has Social Networking Capabilities: Yes
(https://binged.it/2idzikY)

Pinterest

Site Traffic (Rank): 70.60 Million (17)

Site Permits Minors: Yes
(https://about.pinterest.com/en/terms-service)

Derives Revenue from Operation of Site: Yes
(https://about.pinterest.com/en/terms-service)

Site Has Social Networking Capabilities: Yes
(https://about.pinterest.com/en/messages)
(https://help.pinterest.com/en/guide/your-profile)

Tumblr

Site Traffic (Rank): 51.40 Million (18)

Site Permits Minors: Yes
(http://bit.ly/1FJqoBW)

Derives Revenue from Operation of Site: Yes
(https://www.tumblr.com/policy/en/global-advertising)

Site Has Social Networking Capabilities: Yes
(http://bit.ly/2huQ2Ef)

Diply

Site Traffic (Rank): 1.90 Million (19)

Site Permits Minors: Yes
(http://diply.com/static/terms)

Derives Revenue from Operation of Site: Yes
(http://diply.com/static/advertise)

Site Has Social Networking Capabilities: No

Walmart

Site Traffic (Rank): 47.67 Million (20)

Site Permits Minors: Yes
(http://bit.ly/2hpeCGB)

Derives Revenue from Operation of Site: Yes
(http://bit.ly/1I3ggIm)

Site Has Social Networking Capabilities: Yes
(http://bit.ly/2hpeCGB) (http://bit.ly/2h8hcU0)
(http://bit.ly/2hKZJ4m)

ESPN

Site Traffic (Rank): 23.66 Million (21)

Site Permits Minors: Yes
(http://bit.ly/2hY4560)

Derives Revenue from Operation of Site: Yes
(http://espncms.com/advertise-on-espn.html)

Site Has Social Networking Capabilities: Yes.
(https://disneytermsofuse.com/english/#section3)

CNN

Site Traffic (Rank): 46.63 Million (22)

Site Permits Minors: Yes
(http://www.cnn.com/terms)

Derives Revenue from Operation of Site: Yes
(http://www.cnn.com/terms)

Site Has Social Networking Capabilities: Yes
(http://www.cnn.com/terms/comment_policy.html)
(http://cnn.it/2h8d71K)

Office.com

Site Traffic (Rank): 24.91 Million (23)

Site Permits Minors: Yes
(http://bit.ly/1KoLjB1)

Derives Revenue from Operation of Site: Yes
(https://privacy.microsoft.com/en-us/privacy statement)

Site Has Social Networking Capabilities: Yes
(http://bit.ly/1KoLjB1) (http://bit.ly/2hRH2Kr)

MicrosoftOnline

Site Traffic (Rank): 25.61 Million (24)

Site Permits Minors: Yes
(http://bit.ly/1KoLjB1)

Derives Revenue from Operation of Site: Yes
(https://privacy.microsoft.com/en-us/privacy statement)

Site Has Social Networking Capabilities: Yes
(http://bit.ly/1KoLjB1) (http://bit.ly/2hRH2Kr)

PayPal

Site Traffic (Rank): 45.30 Million (25)

Site Permits Minors: No
(http://bit.ly/IGrVjE)

Derives Revenue from Operation of Site: Yes
(http://bit.ly/2hRH3y8)

Site Has Social Networking Capabilities: No

APPENDIX 2

OTHER POPULAR WEB SITES

NYTimes

Site Traffic: 50.22 Million

Site Permits Minors: Yes
(http://nyti.ms/1M2gj8c)

Derives Revenue from Operation of Site: Yes
(http://nyti.ms/2haqGzL)

Site Has Social Networking Capabilities: Yes
(http://nyti.ms/1sBg7S9)

Wordpress

Site Traffic: 49.57 Million

Site Permits Minors: Yes
(https://en.wordpress.com/tos/)

Derives Revenue from Operation of Site: Yes
(https://en.support.wordpress.com/no-ads/)

Site Has Social Networking Capabilities: Yes
(https://wordpress.org/plugins/wp-discussion-board/) (https://wordpress.org/plugins/tags/private-message)

BlogSpot

Site Traffic: 47.54 Million

Site Permits Minors: Yes
(http://bit.ly/2gEzQCJ)

Derives Revenue from Operation of Site: Yes
(https://www.google.com/policies/terms/)

Site Has Social Networking Capabilities: Yes
(https://www.google.com/policies/terms/)

Target

Site Traffic: 42.66 Million

Site Permits Minors: Yes
(http://bit.ly/2hYceYi)

Derives Revenue from Operation of Site: Yes
(http://bit.ly/2hRzHdQ)

Site Has Social Networking Capabilities: Yes
(http://www.target.com/c/terms-conditions/-/N-4sr7l)

Washington Post

Site Traffic: 39.26 Million

Site Permits Minors: Yes
(http://wapo.st/2hpaC8Y)

Derives Revenue from Operation of Site: Yes
(http://wapo.st/2hpaC8Y)

Site Has Social Networking Capabilities: Yes
(http://wapo.st/2idysVm)

Pandora

Site Traffic: 32.69 Million

Site Permits Minors: Yes
(http://pdora.co/2hRBbF1)

Derives Revenue from Operation of Site: Yes
(http://pdora.co/2id2SLD)

Site Has Social Networking Capabilities: Yes
(https://www.pandora.com/privacy)

Fox News

Site Traffic: 29.49 Million

Site Permits Minors: Yes
(http://fxn.ws/2gZXoP6)

Derives Revenue from Operation of Site: Yes
(http://www.foxnews.com/about/privacy-policy/)

Site Has Social Networking Capabilities: Yes
(http://www.foxnews.com/about/privacy-policy/)

Quora

Site Traffic: 25.11 Million

Site Permits Minors: Yes
(http://bit.ly/2hplLXt)

Derives Revenue from Operation of Site: Yes
(https://www.quora.com/about/tos)

Site Has Social Networking Capabilities: Yes
(http://bit.ly/2hFOOsG)

Blogger

Site Traffic: 23.91 Million

Site Permits Minors: Yes
(http://bit.ly/2gEzQCJ)

Derives Revenue from Operation of Site: Yes
(https://www.google.com/policies/terms/)

Site Has Social Networking Capabilities: Yes
(https://www.google.com/policies/terms/)

TripAdvisor

Site Traffic: 23.65 Million

Site Permits Minors: Yes
(http://bit.ly/2hRDNmb)

Derives Revenue from Operation of Site: Yes
(https://www.tripadvisor.com/pages/privacy.html)

Site Has Social Networking Capabilities: Yes
(https://www.tripadvisor.com/pages/privacy.html)

WebMD

Site Traffic: 23.20 Million

Site Permits Minors: Yes
(http://wb.md/2h8gru7)

Derives Revenue from Operation of Site: Yes
(http://wb.md/2h8gru7)

Site Has Social Networking Capabilities: Yes
(http://wb.md/2h8dWHZ)
(http://wb.md/2hSOgQM)

Macy's

Site Traffic: 23.12 Million

Site Permits Minors: Yes
(http://bit.ly/2hp5fac)

Derives Revenue from Operation of Site: Yes
(http://bit.ly/2hp5fac)

Site Has Social Networking Capabilities: Yes
(http://bit.ly/2hXZfWB)

Soundcloud

Site Traffic: 19.11 Million

Site Permits Minors: Yes
(http://bit.ly/2i7ZMbL)

Derives Revenue from Operation of Site: Yes
(https://soundcloud.com/terms-of-use)

Site Has Social Networking Capabilities: Yes
(https://soundcloud.com/terms-of-use)

The Atlantic

Site Traffic: 14.63 Million

Site Permits Minors: Yes
(http://www.theatlantic.com/privacy-policy/)

Derives Revenue from Operation of Site: Yes
(http://theatln.tc/2hpfQ4C)

Site Has Social Networking Capabilities: Yes
(http://www.theatlantic.com/privacy-policy/)

Slate

Site Traffic: 13.78 Million

Site Permits Minors: Yes
(http://slate.me/2hauS2k)

Derives Revenue from Operation of Site: Yes
(http://slate.me/2hauS2k)

Site Has Social Networking Capabilities: Yes
(http://slate.me/1Sgs8JR) (http://slate.me/2i81vxD)

Politico

Site Traffic: 12.91 Million

Site Permits Minors: Yes
(http://politi.co/2hpf2gn)

Derives Revenue from Operation of Site: Yes
(http://www.politico.com/terms-of-service)

Site Has Social Networking Capabilities: Yes
(http://www.politico.com/terms-of-service)

Rolling Stone

Site Traffic: 9.64 Million

Site Permits Minors: No
(http://rol.st/2h0b9gA)

Derives Revenue from Operation of Site: Yes
(http://rol.st/2i7QT1F)

Site Has Social Networking Capabilities: Yes
(http://www.rollingstone.com/services/privacypolicy)

Bleacher Report

Site Traffic: 8.74 Million

Site Permits Minors: Yes
(http://ble.ac/2hpbfj3)

Derives Revenue from Operation of Site: Yes
(http://bleacherreport.com/advertise)

Site Has Social Networking Capabilities: Yes
(http://bleacherreport.com/pages/terms)

Monster

Site Traffic: 7.85 Million

Site Permits Minors: Yes
(http://bit.ly/1rq0cIA)

Derives Revenue from Operation of Site: Yes
(http://inside.monster.com/policy/inside2.aspx)

Site Has Social Networking Capabilities: Yes
(http://inside.monster.com/terms-of-use)

CareerBuilder

Site Traffic: 3.79 Million

Site Permits Minors: Yes
(http://www.careerbuilder.com/terms)

Derives Revenue from Operation of Site: Yes
(http://bit.ly/2hSWpEM)

Site Has Social Networking Capabilities: Yes
(http://bit.ly/2harB30)

AngelList

Site Traffic: 2.41 Million

Site Permits Minors: Yes
(https://angel.co/terms)

Derives Revenue from Operation of Site: Yes
(https://angel.co/terms)

Site Has Social Networking Capabilities: Yes
(https://angel.co/terms)

Raleigh News and Observer

Site Traffic: 1.23 Million

Site Permits Minors: Yes
(http://www.newsobserver.com/customer-service/terms-of-service/)

Derives Revenue from Operation of Site: Yes
(http://www.newsobserver.com/customer-service/terms-of-service/)

Site Has Social Networking Capabilities: Yes
(http://www.newsobserver.com/customer-service/commenting-policy/)

ECORD
AND
RIEFS.

Supreme Court, U.S.
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DEC 22 2016
OFFICE OF THE CLERK

No. 15-1194

IN THE

Supreme Court of the United States

LESTER GERARD PACKINGHAM,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the
Supreme Court of North Carolina

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC), THIRTY TECHNICAL EXPERTS AND LEGAL SCHOLARS, AND FIVE PRIVACY AND CIVIL LIBERTIES ORGANIZATIONS IN SUPPORT OF PETITIONER

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December 22, 2016

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.[2]

EPIC routinely participates as *amicus curiae* before this Court in cases concerning emerging privacy and civil liberties issues. *See, e.g.*, *amicus curiae* briefs of EPIC in *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (arguing that evidence obtained via suspicionless identification should be suppressed); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (arguing that hotel guest registries should not be made available for inspection absent judicial review); *Riley v. California*, 134 S. Ct. 2473 (2014) (arguing that the of search a cell phone incident to arrest requires a warrant); *United States v. Jones*, 132 S. Ct. 945 (2012) (arguing that a warrant is required for the use of GPS tracking techniques); *Sorrell v. IMS Health*

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[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

Inc., 564 U.S. 52 (2011) (arguing that the privacy interest in medical records justifies regulating data mining of prescription records); *Tolentino v. New York*, 562 U.S. 1043, (2010) (arguing that evidence obtained from defendant's identity should be suppressed when discovered as a result of an unlawful stop), *dismissed as improvidently granted*, 563 U.S. 123 (2011); *Doe v. Reed*, 561 U.S. 186 (2010) (arguing that state law should not force the disclosure of petition signatories); *Herring v. United States*, 555 U.S. 135 (2009) (arguing for the suppression of evidence obtained as the result of an error in a criminal justice database); *Hiibel v. Sixth Judicial Dist. Ct. of Nevada, Humboldt Cty.*, 542 U.S. 177 (2004) (arguing that identification may not be compelled absent probable cause to arrest); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Stratton, Ohio*, 536 U.S. 150 (2002) (arguing that door-to-door petitioners should not have to obtain a permit and identify themselves).

Technical Experts and Legal Scholars

Ann M. Bartow, Professor, Pace Law School

Colin J. Bennett, Professor, University of Victoria

Christine L. Borgman, Professor & Presidential Chair in Information Studies, UCLA

David Chaum, Chaum, LLC

Danielle Keats Citron, Morton & Sophia Macht Professor of Law, University of Maryland School of Law

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Laura Donohue, Professor, Director of the Center for National Security and the Law & Center on Privacy and Technology, Georgetown University Law Center

Addison Fischer, Founder and Chairman, Fischer International Corp.

Hon. David Flaherty, former Information and Privacy Commissioner for British Columbia

Deborah Hurley, Harvard University and Brown University

Ian Kerr, Canada Research Chair in Ethics, Law & Technology, University of Ottawa Faculty of Law

Harry R. Lewis, Gordon McKay Professor of Computer Science, Harvard University

Gary T. Marx, Professor Emeritus of Sociology, MIT

Mary Minow, Library Law Consultant

Eben Moglen, Professor of Law, Columbia Law School; Founding Director, Software Freedom Law Center

Dr. Pablo Garcia Molina, Adjunct Professor, Georgetown University

Dr. Peter G. Neumann, Computer Science Laboratory, SRI International

Dr. Deborah Peel, M.D., Founder and Chair, Patient Privacy Rights

Stephanie Perrin, President, Digital Discretion, Inc.

Chip Pitts, Lecturer in Law, Stanford Law School

Ronald L. Rivest, Professor of Electrical Engineering and Computer Science, MIT

Bruce Schneier, Security Technologist; Author, *Data and Goliath* (2015)

Dr. Barbara Simons, IBM Research (retired)

Robert Ellis Smith, Publisher, Privacy Journal

Nadine Strossen, John Marshall Harlan II Professor of Law, New York Law School; Former President, American Civil Liberties Union

Sherry Turkle, Abby Rockefeller Mauzé Professor of the Social Studies of Science and Technology, MIT

Edward G. Viltz, President and Chairman, Internet Collaboration Coalition

Christopher Wolf, Board Chair, Future of Privacy Forum

Shoshana Zuboff, Charles Edward Wilson Professor of Business Administration, Retired

(Affiliations are for identification only)

Privacy and Civil Liberties Organizations

Bill of Rights Defense Committee/Defending Dissent Foundation

The Bill of Rights Defense Committee/Defending Dissent Foundation is a national non-profit education and advocacy organization dedicated to fulfilling the promise of the Bill of Rights for everyone. We place a special emphasis on protecting the right to engage in political expression, as we were founded in 1960 by activists opposed to the activities of the House Un-American Activities Committee. As such, we are involved in defending the rights of individuals to read and receive materials on the internet freely and

curtailing the powers of the government to surveil social media and other online activity.

Center for Constitutional Rights

The Center for Constitutional Rights (CCR) is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966 by attorneys who represented civil rights movements and activists in the South, CCR has protected the rights of marginalized groups for fifty years and has litigated historic First Amendment cases including *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Texas v. Johnson*, 491 U.S. 397 (1989), *United States v. Eichman*, 496 U.S. 310 (1990), and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). As such, CCR has an interest in ensuring that the government does not impose arbitrary restrictions on speech, particularly when such restrictions are based on disfavored status.

Consumer Action

Through multilingual financial education materials, community outreach, and issue-focused advocacy, Consumer Action empowers underrepresented consumers nationwide to assert their rights in the marketplace and financially prosper.

Freedom to Read Foundation

The Freedom to Read Foundation (FTRF) is an organization established by the American Library

Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

National Center for Transgender Equality

The National Center for Transgender Equality (NCTE) is a national social justice organization founded in 2003 and devoted to advancing justice, opportunity and well-being for transgender people through education and advocacy on national issues.

SUMMARY OF THE ARGUMENT

The First Amendment protects not only the right to speak freely, but also the right to receive information and ideas. As this Court has explained, "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). By dramatically limiting the range of news and social media websites that released sex offenders can access—sweeping far beyond any direct communication with minors—N.C. Gen. Stat § 14.202.5 runs roughshod over the freedom to access protected speech. The same First Amendment that protects the right to possess even legally obscene content in the home does not permit the state to prohibit access to some of the most widely used channels for protected speech. To hold otherwise would be in direct conflict with "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Stanley*, 394 U.S. at 564 (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

Nor is that the full extent of harms worked by section 14.202.5. For every website that released offenders are forbidden to visit, the statute creates a parallel incentive for the state to surveil. That is exactly how the instant case began: with police monitoring of a social media network. A statute that relies on dragnet surveillance of protected speech available to hundreds of millions internet users poses a grave threat to the privacy and free expression of all Internet users—not merely the offenders that the statute targets.

"Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley*, 394 U.S. at 564. Yet that is precisely the effect this law promises to have.

ARGUMENT

I. The First Amendment Protects the Right to Access Speech from the Privacy of a Personal Electronic Device

Section 14.202.5 works a constitutional violation of staggering dimensions. The statute crudely sorts the "vast democratic forums of the Internet," *Reno v. ACLU*, 521 U.S. 844, 868 (1997), into two buckets: websites that are acceptable reading material for released offenders, and those that are not. If a website happens to allow users under 18 to register online, it is subject to the censor's pen, and no released offender may access *any* part of that website without fear of prosecution. This site-wide ban admits no exception, walling off news, debate, sports, scholarship, art, and every other shred of speech published under the same domain name.

Such an audacious restraint on the "right to receive information and ideas" cannot be squared with the First Amendment. *Stanley*, 394 U.S. at 564. A person's private reading preferences are entirely "his own and beyond the reach of government." *Jacobson v. United States*, 503 U.S. 540, 552 (1992). So robust is the freedom "to satisfy [one's] intellectual and emotional needs" in private that it extends even to speech which is unprotected in other settings. *Stanley*, 394 U.S. at 565.

North Carolina's statute flouts this right and impermissibly "dictate[s] to the mature adult what books he may have in his own private library." *Stanley*, 394 U.S. at 562 n.7 (quoting *State v. Mapp*, 166 N.E.2d 387, 393 (1960)). Indeed, the law reaches further than a conventional book ban ever could, tightening access to many of the billion-plus websites that populate the Internet and span the province of human knowledge. Scott Burns, *Already 1 Billion Websites, and Counting*, Houston Chronicle (Sept. 9, 2014).[3] Yet the state can no more criminalize what an individual chooses to read on a personal electronic device than it can restrict the contents of a home library: the privacy of both is sacrosanct. *Riley v. California*, 134 S. Ct. 2473, 2491 (2014) ("The possibility that a search might extend well beyond the papers and effects in the physical proximity of an arrestee is yet another reason that the privacy interests here dwarf those in *Robinson*.").

A. The Freedom of Speech Includes the Right to Pursue Information and Ideas Without Government Interference

Time and again, this Court has emphasized "that the Constitution protects the right to receive information and ideas." *Stanley*, 394 U.S. at 564; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (invalidating "a restriction on access to information

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[3] http://www.chron.com/business/burns/article/Already-1-billion-websites-and-counting-5744910.php. By contrast, the Library of Congress contains only 162 million physical works. *The Library of Congress by the Numbers in 2015*, Library of Congress (Feb. 1, 2016), https://www.loc.gov/item/prn-16-023/.

in private hands" as a violation of the First Amendment); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 386–87 (1998) ("Our decisions have concluded that First Amendment protection extends equally to the right to receive information . . . ."); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (quoting *Stanley*, 394 U.S. at 564) ("[W]e have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.'"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (noting that the First Amendment protects "public access to discussion, debate, and the dissemination of information and ideas"); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("[The First Amendment] embraces the right to distribute literature and necessarily protects the right to receive it." (citation omitted)). "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

The right to access information "is an inherent corollary of the rights of free speech and press" in two respects. *Pico*, 457 U.S. at 867. First, "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them," *id.*, for "[i]t would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J.,

concurring). Second, and "[m]ore importantly, the right to receive ideas is a necessary predicate to the *recipient*'s meaningful exercise of his own rights of speech, press, and political freedom." *Pico*, 457 U.S. at 867 (emphasis in original).

That right is all the more essential in the most intimate and familiar spaces of a person's life—those "private sphere[s]" which "the Constitution reserves from the intrusive reach of government." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 548 (1989). Writing almost a century ago, Justice Louis Brandeis reflected on the inseparable constitutional relationship between privacy and the right to pursue information and ideas:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967); *see also* Nadine Strossen, *Protecting Privacy and Free Speech in Cyberspace*, 89 Geo. L.J. 2103, 2105 (2001) ("[P]rominent champions of free speech rights have viewed privacy as the ultimate

bedrock of all our civil liberties, including our First Amendment rights."); Anita L. Allen & Marc Rotenberg, *Privacy Law and Society* 363 (3d ed. 2016) ("The First Amendment protects the mind's encounters with the sacred and the profane.").

In *Stanley*, this Court made clear that the right to "read or observe" materials in "the privacy of [one's] own home" is particularly far-reaching. *Stanley*, 394 U.S. at 564–65. Faced with a Georgia law that made "mere private possession of obscene matter" a crime, the Court deemed the premise of the statute "wholly inconsistent with the philosophy of the First Amendment." *Id.* at 565. The Court wrote:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id. The Court further explained that "the right to access information in private is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws." *Id.* at 568. In other words: the right to receive ideas in private settings extends even farther than the ordinary sweep of the First Amendment, giving individuals the freedom to absorb speech that could

be permissibly suppressed in other contexts. *Id.* at 565; *see also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815 (2000) (noting the "First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt").

Of course, section 14.202.5 does not target unprotected categories of speech. Rather, it closes off vast, undifferentiated expanses of news and information. For example, the law bars access to entire websites, regardless of what type of information is being accessed or posted, merely because a person under 18 may create an account. It is difficult to conceive of a more brazen violation of the right to access ideas—or the right to be let alone—than this wholesale removal of works from an individual's digital library. As to such forms of censorship, this Court's precedents are unequivocal. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge," *Pico*, 457 U.S. at 866, for the "right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *Stanley*, 394 U.S. at 564.

B. Today's 'Private Library' Includes Information and Ideas Accessed on a Personal Electronic Device

With the rise of the Internet and personal electronic devices, the composition of today's "private library" has changed dramatically since the days of *Stanley*. "[M]any of the cultural activities we engage in inside the home—reading, watching a video, surfing the Web—can now be performed in the

privacy of a digital home instead of a physical one." Marc Jonathan Blitz, *Stanley in Cyberspace: Why the Privacy Protection of the First Amendment Should Be More Like That of the Fourth*, 62 Hastings L.J. 357, 361 (2010). For example:

> Instead of relaxing in our living rooms, we might do so in the much more "spacious" living room of a virtual mansion we acquire in Second Life or another virtual world. Instead of buying a safe or chest to store paper documents in a closet, we might buy virtual space in the "cloud" of computer-based storage that numerous companies, such as Google, Apple, or Dropbox, provide for people to store digital files outside of their homes. Instead of buying and reading a physical book, many individuals armed with an eReader, an iPad, or another tablet computer might read a digital book . . . .

Id. at 361–62. *See also* Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1195 (1998) ("The revolution in our communications infrastructure—in particular, the explosive growth of the Internet—has fundamentally transformed how we create, acquire, disseminate, and use information. . . . Now, digitized libraries make available vast resources, regardless of distance.").

The trend toward an ever-more digital personal library is ubiquitous. Some 84% of American adults now use the Internet. Andrew Perrin & Maeve

Duggan, *Americans' Internet Access: 2000-2015*, Pew Research Center (June 26, 2015).[4] "Nearly four-in-ten U.S. adults (38%) [say] that they often get news from digital sources, including news websites or apps (28%) and social networking sites (18%)." Kristine Lu & Jesse Holcomb, *Digital News Audience: Fact Sheet*, Pew Research Center (June 15, 2016).[5] Of Americans who are online, 79% access content on Facebook, and 76% of those users visit the site on a daily basis. Shannon Greenwood, Andrew Perrin, & Maeve Duggan, *Social Media Update 2016*, Pew Research Center (Nov. 11, 2016).[6] And while 63% of adult Americans say they still read at least one print book per year, 27% peruse an e-book and 12% listen to an audio book on an annual basis. Lee Rainie & Andew Perrin, *Slightly Fewer Americans Are Reading Rrint Books, New Survey Finds*, Pew Research Center (Oct. 19, 2015).

When this Court first addressed the issue of internet censorship in *Reno v. ACLU*, 521 U.S. 844 (1977), it recognized "adults have a constitutional right to receive" information online and "to address [that speech] to one another." 521 U.S. at 874. The Court struck down Congress's first attempt to restrict publication and transmission of indecent and patently offensive content online, in part because the statute was not sufficiently tailored and imposed a

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[4] http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/.

[5] http://www.journalism.org/2016/06/15/digital-news-audience-fact-sheet/.

[6] http://www.pewinternet.org/2016/11/11/social-media-update-2016/.

burden on adults' intellectual freedom. *Id.* The government's attempt to regulate speech on the Internet—a medium "as diverse as human thought"—was tantamount to "burn[ing] the house to roast the pig" and threatened to "torch a large segment of the Internet community." *Id.* at 870, 882 (citation omitted).

Congress subsequently passed the Children's Online Protection Act ("COPA") in response to the Court's decision in *Reno*, and that statute was again enjoined by the Court in *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004), because it did not account for "less restrictive alternatives" and instead imposed "universal restrictions at the source." *Id.* at 673, 667.

More recently, this Court underscored the profoundly private nature of the information accessible through a personal electronic device. In *Riley v. California*, 134 S. Ct. 2473 (2014), the Court held that the Fourth Amendment bars warrantless searches of cell phones, even when undertaken for the general safety of arresting officers or to prevent the destruction of evidence. *Id.* at 2485. In reaching that conclusion, the Court described at length the ways in which a personal electronic device holds "the privacies of life," *id.* at 2495:

> First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's

> private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Id. at 2489. The Court continued:

> An Internet search and browsing history . . . can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns . . . . Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

Id. at 2490–91.

Taken together, *Stanley*, *Reno*, and *Riley* demonstrate that the right to access information on a personal electronic device is coextensive with the right to do so at home. In either instance, the state intrudes on "most intimate and familiar space[s]" of a person's life, *Florida v. Jardines*, 133 S. Ct. 1409, 1419 (2013) (Kagan, J., concurring), when it

"dictate[s] to the mature adult" what information he may access. *Stanley*, 394 U.S. at 562 n.7.

The government can no more tell a woman what websites she may access from the privacy of her computer than it can "tell[] a man, sitting alone in his own house, what books he may read." *Stanley*, 394 U.S. at 565. Section 14.202.5 offends the Constitution in exactly this way. By placing entire websites off limits to the private contemplation of released offenders, it attempts to do in a digital realm that which *Stanley* expressly prohibits in the home. Yet the First Amendment permits no such restraint on internet expression and no such invasion of a person's private thoughts.

C. North Carolina's Statute Hides a Breathtaking Amount of Speech From the View of Released Offenders

The alarming reach of section 14.202.5 is apparent from the many and varied websites that it censors. North Carolina's statute makes it a crime to "access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." § 14.202.5(a). A "commercial social networking Web site" is defined as any website that satisfies four criteria: (1) the site must be "operated by a person who derives revenue from . . . the operation of the Web site"; (2) it must "[f]acilitate[] the social introduction between two or more persons"; (3) it must "[a]llow[] users to create Web pages or personal profiles"; **and** (4) it must "[p]rovide users or visitors . . . mechanisms to communicate with other users." § 14.202.5(b). Two narrow classes of websites are excluded: (1) any site

that "[p]rovides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform"; and (2) any site that "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors." § 14.202.5(c).

This is a strikingly broad definition of "commercial social networking Web site." Certainly a released offender may not visit Facebook or Myspace—provided he is aware that these websites permit minors to register—as both are squarely covered by section 14.202.5(b). But the prohibition extends much farther. Take, for example, the New York Times website, http://www.nytimes.com/, which is clearly a commercial site (thus satisfying the first requirement). Readers can post comments and responses to articles the day they are published (thus satisfying the second and fourth requirements).[7] These comments are linked to public profiles, which users create if they want to log in to the site (thus satisfying the third requirement).[8] The New York Times, and other similar news sites with comment

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[7] *See, e.g.*, *Help: Comments*, The New York Times, *available at* http://www.nytimes.com/content/help/site/usercontent/usercontent.html#usercontent-closed (last visited Dec. 20, 2016).

[8] *See Edit Profile*, The New York Times, *available at* http://www.nytimes.com by logging in at the top right and selecting "Edit Profile" from the top right menu (last visited Dec. 20, 2016) ("Your profile is public. It will appear with any comments you leave with the NYTimes.com.")

threads and profiles, could thus qualify as commercial social media websites under the statute.

In addition, the New York Times and other similar sites typically allow minors to register and subscribe if they are "13 years or older." *Terms of Service*, NYTimes.com (Nov. 15, 2015).[9] As a result, Petitioner and other similarly situated individuals are barred from checking the latest online news from the New York Times, the Washington Post, Politico, Newsweek, or CNN. *See Terms of Service*, Washington Post (July 1, 2014);[10] *Terms of Service*, Politico (July 11, 2016);[11] *Terms of Service*, Newsweek;[12] *CNN Service Agreement*, CNN.com (Sept. 24, 2015).[13] Nor may he post his personal thoughts—or read the thoughts of others—on blogging platforms like Tumblr and LiveJournal, because they, too, rely on profiles and comment threads to facilitate social interactions. *Terms of Service*, Tumblr (Sept. 8, 2016);[14] *Terms of Service*, LiveJournal (Dec. 12, 2010).[15] He may not listen to music on Last.fm, or read discussion threads on Reddit, or look up an actor's name on IMDb because those sites also enable sharing and commenting for

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[9] http://www.nytimes.com/content/help/rights/terms/terms-of-service.html.

[10] https://www.washingtonpost.com/terms-of-service/2011/11/18/gIQAldiYiN_story.html.

[11] http://www.politico.com/terms-of-service.

[12] http://www.newsweek.com/terms-service (last visited Dec. 14, 2016).

[13] http://www.cnn.com/2014/01/17/cnn-info/interactive-legal/.

[14] https://www.tumblr.com/policy/en/terms-of-service.

[15] http://www.livejournal.com/legal/tos.bml.

registered users. *Terms of Use*, Last.fm (June 2, 2015);[16] *Reddit user agreement*, Reddit (May 27, 2016);[17] *IMDb Conditions of Use*, IMDb.[18] These sites are not alone in facilitating social interactions because that has increasingly become a standard feature of modern commercial websites. For example, Petitioner may not explore the work of artists on Dribbble, or watch videos on YouTube, or explore his own ancestry on MyHeritage. *Terms of Use*, Dribbble (Mar. 19, 2013);[19] *Terms of Service*, YouTube (June 9, 2010);[20] *Welcome to MyHeritage*, MyHeritage.[21]

In short, section 14.202.5 radically reshapes the internet available to a released offender, placing enormous quantities of protected expression out of bounds. The statute does not even pretend to require a meaningful nexus between the expression that it censors and people it aims to protect: speech need only share a common domain name with "social networking" activity by minors in order to land on the statute's blacklist. Section 14.202.5 is thus fatally overbroad, in that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). This overbreadth is compounded by the statute's puzzling

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[16] http://www.last.fm/legal/terms.

[17] https://www.reddit.com/help/useragreement/.

[18] http://www.imdb.com/conditions (last visited Dec. 14, 2016).

[19] https://dribbble.com/termsz.

[20] https://www.youtube.com/static?template=terms.

[21] https://www.myheritage.com/FP/Company/popup-terms-conditions.php (last visited Dec. 14, 2016).

exclusion of single-use platforms, § 14.202.5(c)(1), which allows released offenders to access speech through email and chatrooms that they could not access on news and social networking websites. Such an exception leaves the statute "wildly underinclusive when judged against its asserted justification, . . . rais[ing] serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011).

The Tenth Circuit has previously rejected the logic of North Carolina's statute in the context of brick-and-mortar libraries. In *Doe v. City of Albuquerque*, 667 F.3d 1111 (10th Cir. 2012), the court considered an Albuquerque regulation that barred released offenders from all public libraries in the city. *Id.* at 1116. Noting that a library is "the quintessential locus of the receipt of information" whose "very purpose . . . is to aid in the acquisition of knowledge through reading, writing, and quiet contemplation," the court struck down the city's "wholesale ban on any and all access to public libraries" as a violation of the First Amendment. *Id.* at 1129, 1134 (citations omitted). The city had failed, the court wrote, to show "that its ban was narrowly tailored to serve its interest in providing a safe environment for library patrons." *Id.* at 1133–34.

Section 14.202.5 fares no better. If a state may not ban released offenders from *public* libraries, surely it may not bar them from accessing a wide range of websites from the privacy of their own homes and electronic devices. However laudable the state's goals, North Carolina cannot simply "burn the house to roast the pig" where speech is concerned.

Reno, 521 U.S. at 882. The First Amendment does not permit it.

II. Laws That Rely on Dragnet Surveillance of Online Speech Threaten Privacy and Free Expression

Section 14.202.5 curtails privacy and free speech in a second way: by inviting police to engage in large-scale monitoring of news and social media sites. In forbidding registered offenders to access web-based services, the statute effectively requires police to surveil the internet to monitor the use of suspect and non-suspect alike. Given the wide range of content subject to section 14.202.5, meaningful enforcement would be functionally impossible by other means.

But placing government in the role of permanent eavesdropper is highly corrosive to privacy and free expression on the internet. Faced with the knowledge that a prying official may collect and scrutinize the contents of their personal profiles, individuals will inevitably trend towards greater self-censorship. *See* Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech, in Constitution 3.0* at 72–73 (Jeffrey Rosen & Benjamin Wittes eds., 2011) (explaining how "ubiquitous surveillance" through Facebook might "violate[] the right to autonomy," just as "citizens in the Soviet Union were inhibited by ubiquitous surveillance from expressing and defining themselves"). Nor are these effects limited to the released offenders that section 14.202.5 targets: *all* internet users must bear the weight of its impact.

A. Section 14.202.5, Which Asks Police to Find Needles in Haystacks, Cannot be Implemented Without Large-Scale Monitoring of Online Speech

Though section 14.202.5 sweeps broadly, it operates simply. The statute defines a universe of "commercial social networking Web sites" and prohibits released offenders from accessing those websites (provided that an offender is aware that a particular site allows minors to register). § 14-202.5(a)-(b).

What this simplicity obscures, however, is the far-reaching government surveillance that the law necessitates. North Carolina's registry includes nearly 15,000 released offenders residing in-state and another 4,700 living out of state. *Offender Statistics*, North Carolina Department of Public Safety.[22] To meaningfully police such a large group of people—or even a tiny fraction thereof—for compliance with section 14.202.5 is impossible without large-scale monitoring of social media profiles, photos, and other content. Given the statute's sprawling reach, such surveillance could extend to dozens of major websites and an incalculable number of smaller ones, placing huge segments of the internet under the watchful eye of police.

This kind of surveillance is hardly far-fetched: it is exactly what led to Petitioner's arrest under section 14.202.5. At the time, an officer from the Durham Police Department had begun a probe "to

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[22] http://sexoffender.ncsbi.gov/stats.aspx (last visited Dec. 14, 2016).

detect such sex offenders living in Durham who were illegally accessing commercial social networking Web sites." *North Carolina v. Packingham*, 777 S.E.2d 738, 742 (2015). It was during this dragnet search, conducted with no apparent particularized suspicion of wrongdoing, that the officer located Petitioner's photo linked to a pseudonymously registered account. *Id.*

An increasing number of police agencies have engaged in this troubling and controversial practice in recent years. For instance, the Federal Bureau of Investigation recently hired private firm Dataminr to persistently monitor the more than 500 million tweets posted on Twitter each day. *Limited Source Justification, Requisition Number: DJF-17-1300-PR-0000555*, Federal Bureau of Investigation (Nov. 8, 2016).[23] The announcement was greeted with well-earned skepticism. *See, e.g.*, Tim Cushing, *Twitter Says Its API Can't Be Used For Surveillance, But What Does It Think The FBI's Going to Do With It?*, Techdirt (Nov. 22, 2016) ("Given the agency's long history of engaging in surveillance of protected political activity, it's not much of a stretch to believe the FBI will use Dataminr's tools for the same ends.").[24]

Similarly, the Boston Police Department recently announced that it would spend up to $1.4 million on social media monitoring software. Jan

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[23] *Available at* https://epic.org/privacy/fbi/Dataminr-Limited-Source-Justification.pdf.

[24] https://www.techdirt.com/articles/20161117/15480436077/twitter-says-api-cant-be-used-surveillance-what-does-it-think-fbis-going-to-do-with-it.shtml.

Ransom, *Boston Police Set to Buy Social Media Monitoring Software*, Boston Globe (Nov. 26, 2016).[25] The plan has drawn widespread criticism. *See, e.g.*, Zeninjor Enwemeka, *Boston Police Plan To Buy Social Media Monitoring Software Draws Criticism*, WBUR News (Dec. 6. 2016) ("[Taylor Campbell of Quincy] likened social media sites to a public square and said keeping watch on them could have 'a chilling effect on speech.'"); *see also* Marc Rotenberg, Letter to the Editor, *Criticism 'Bombs'*, Boston Herald (Oct. 14, 2016) ("As law enforcement agencies have developed imperfect tools for electronic surveillance more and more innocent people are falling under suspicion.").

And in 2012, a Freedom of Information Act lawsuit by EPIC revealed that the Department of Homeland Security was monitoring "online forums, blogs, public websites, and messages boards" and disseminating the results to law enforcement agencies and private companies. *EPIC v. Department of Homeland Security: Media Monitoring*, EPIC.[26] As a consequence, Congress undertook oversight hearings to rein in this practice. Representative Patrick Meehan, Chairman of the House Subcommittee on Counterterrorism and Intelligence, warned at the hearing that "collecting, analyzing, and disseminating private citizens' comments could have a chilling effect on individual privacy rights and

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[25] https://www.bostonglobe.com/metro/2016/11/25/boston-police-set-buy-social-media-monitoring-software/Vswk24jmuBkuMmPbPY4iYI/story.html.

[26] https://epic.org/foia/epic-v-dhs-media-monitoring/ (last visited Dec. 14, 2016).

people's freedom of speech and dissent against their government." *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy: Hearing Before the Subcomm. on Counterterrorism & Intelligence of the H. Comm. on Homeland Sec.*, 112th Cong. 2 (2012) (statement of Rep. Patrick Meehan, Chairman, Subcomm. on Counterterrorism & Intelligence).[27]

North Carolina is not immune to this alarming trend. At least two entities—Durham County and the North Carolina Department of Justice—have spent over $20,000 apiece on subscriptions to the social tracking software Geofeedia. *Purchase Order Records for Purchases of Social Media Monitoring Software by State and Local Governments*, Brennan Center for Justice 9, 10 (Nov. 14, 2016).[28] Geofeedia describes itself as a "cloud-based, location-based intelligence platform" that lets subscribers "predict, analyze, and act on real-time social media content by location." *How It Works*, Geofeedia.[29] Two other North Carolina governments—Charlotte and Rocky Mount—have spent upwards of $14,000 each on Snaptrends, a similar tracking program. Brennan Center for Justice, *supra*, at 3, 6.

Such is the inevitable consequence of laws and policies that ask police to find needles in digital

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[27] https://homeland.house.gov/files/02-16-12%20Meehan%20Open.pdf.

[28] https://www.brennancenter.org/sites/default/files/analysis/Purchase_Order_Records_for_Purchases_Social_Media_Monitoring_Software_State_Local_Govts.pdf.

[29] https://geofeedia.com/products/how-it-works/ (last visited Dec. 14, 2016).

haystacks: greater government tracking of online speech. Yet the First Amendment, and indeed "our whole constitutional heritage," bristles at this pervasive form of monitoring. *Stanley*, 394 U.S. at 564; *see United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) ("Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse."); *NASA v. Nelson*, 562 U.S. 134, 145 n.6 (2011) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion."); *United States v. Di Re*, 332 U.S. 581, 595 (1948) ("[T]he forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.").

B. Social Media Monitoring Chills Free Expression and Invades the Privacy of All Users

Of course, it is not just released offenders whose privacy and free speech suffer under the surveillance spurred by section 14.202.5. Any person—adult or minor—who uses a "commercial social networking Web site" may be subject to such monitoring.

By design, digital dragnets collect and analyze data from scores of individuals who have no connection to the matter being investigated. For example, if a police officer in North Carolina were to search through Facebook for a released offender

using the pseudonym John Smith, it would be difficult to find the right person (if at all) without scanning through the personal profiles of a great many John Smiths. And there is little reason to think that surveillance under section 14.202.5 would remain so narrowly targeted. The law covers an immense constellation of websites and thousands upon thousands of released offenders—far too much content to reliably monitor without the type of automated assistance that North Carolina governments are increasingly using. *See supra* Part II.A.

Whatever the precise tools used to enforce section 14.202.5, the effect of enforcement-by-surveillance is to curtail the privacy and discourage the free expression of *all* users on affected websites. It has long been recognized that "government has often used improper means to gather information about individuals who posed no threat either to their government or their fellow citizens." Report of the Chairman—Samuel Alito, *Conference on the Boundaries of Privacy in American Society*, Woodrow Wilson Sch. of Pub. & Int'l Affairs, Princeton Univ. at 8 (Jan. 4, 1972). The impact of such "panoptic surveillance" is severe, as Professor Julie Cohen describes: "In creating fixed records of presence, appearance, and behavior at particular places and times, surveillance constitutes institutional and social memory." Julie E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* 137 (2012). Professor Cohen goes on to conclude that "surveillance of online activities alters the experience of space in the same ways that surveillance of real places does." *Id.* at 143.

Yet, as Professor Michael Froomkin has noted, the average citizen "is almost defenseless" in the "environment of increasingly pervasive surveillance of communications, transactions, and movements." A. Michael Froomkin, *Pseudonyms by Another Name: Identity Management in a Time of Surveillance, in Privacy in the Modern Age* 63 (Marc Rotenberg, Julia Horwitz, & Jeramie Scott eds., 2015). That is why constitutional limits on programs that would require such broad-scale surveillance are so essential. Without such protections, individuals fall victim to a "spiral of silence" where "motivated by fear of isolation, [they] continuously monitor their environments to assess whether their beliefs align with or contradict majority opinion." Elizabeth Stoycheff, *Under Surveillance: Examining Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring*, Journalism & Mass Comm. Q., March 2016, at 1.

***

The First Amendment protects the right to receive information and ideas—never more so than in private. By sharply limiting the speech that released offenders may access from a personal electronic device, section 14.202.5 works a blatant violation of that fundamental freedom. Further, by promoting across-the-board surveillance of news and social media websites, the statute imperils the privacy and free expression of all internet users. It should be struck down.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to reverse the decision of the Supreme Court of North Carolina.

Respectfully submitted,

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RECORD AND BRIEFS

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In The
Supreme Court of the United States

LESTER GERARD PACKINGHAM,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of North Carolina

BRIEF OF *AMICI CURIAE* STATE OF LOUISIANA AND TWELVE OTHER STATES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

To confront the threat sexual predators pose to children, the North Carolina Legislature enacted a statute that forbids registered sex offenders from accessing "commercial social networking Web sites" that permit minors to become members. N.C. Gen. Stat. § 14-202.5. Petitioner, a registered sex offender, was convicted of violating the statute by creating and accessing a Facebook page. Facebook's terms of use expressly forbid convicted sex offenders from using the site. The question presented is:

Whether the North Carolina Supreme Court correctly held, applying intermediate scrutiny, that the prosecution of petitioner under § 14-202.5 did not violate the First Amendment.

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INTEREST OF *AMICI CURIAE*

The Attorneys General are the chief legal officers of their respective States, and they have a vital interest in reducing the number of sex crimes that occur over the Internet. As this Court knows, "[s]ex offenders are a serious threat in this Nation" and "the victims of sexual assault are most often juveniles." *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality). The States have the primary responsibility to meet this daunting problem.

All States have a significant interest in preventing sex offenders from committing additional sex crimes against minors and harvesting information about potential targets on social media. The diligent discharge of the duty to protect the public has been assumed here by North Carolina, which has attempted to devise a solution to a difficult problem. The First Amendment time, place, and manner test leaves States some latitude to decide how best to protect the public from habitual sex offenders.

SUMMARY OF ARGUMENT

North Carolina, as well as every other State in this Union, is seeking a practical solution to a practical problem. The problem is that social media is a dangerous place for children and that registered sex offenders disproportionately commit additional sex crimes online.

North Carolina and a couple of other jurisdictions have proactively sought to prevent online crimes against children from occurring on social media by excluding registered sex offenders from it, even after parole or probation restrictions have ended. North Carolina's concern is not based upon vague generalities. Social networking websites play a role in one-third of Internet-related sex crimes which culminate in an arrest.[1] Of those arrests involving social networking, the vast majority of the offenders used social networking sites to access information about the victim. *Id.* A 2006 study showed that, in the past year, one out of every twenty-five youths had received an unwanted sexual solicitation online by a person who later attempted to contact the youth offline.[2]

This Court has consistently recognized the high recidivism rate of sex offenders. *See, e.g.*, *United States v. Kebodeaux*, 133 S.Ct. 2496, 2503 (2013); *Lile*, 536 U.S. at 33-34 (plurality). Risk of recidivism does not necessarily go away with time. One study showed that, over a twenty-five year period, fifty-two percent of persistent child molesters were rearrested for a new sex offense and thirty-nine percent of rapists were

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[1] Kimberly Mitchell et al., *Use of Social Networking Sites in Online Sex Crimes Against Minors: An Examination of National Incidence and Means of Utilization*, 3 (Manuscript Accepted Jan. 9, 2010), http://www.unh.edu/ccrc/pdf/CV174.pdf, later published in the Journal of Adolescent Health, Vol. 47, Issue 2, at 183-190.

[2] Janis Wolak et al., *Online Victimization of Youth: Five Years Later*, National Center for Missing & Exploited Children, 1 (2006), http://www.missingkids.com/en_US/publications/NC167.pdf.

rearrested for a new sex offense.[3] In general, risk of recidivism also increases with the ease of access to victims. *Id.* at 12. There is nothing to suggest that this risk decreases once parole or probation ends. With seventy-one percent of teenagers active on social networking websites and half of these profiles visible and available to the public, today's sex offenders have access to a far greater number of potential victims than those in the pre-Internet days when offenders were generally limited to in-person contact.[4]

The States may prevent sex crimes against minors from occurring by appropriately regulating the time, place, and manner of speech on the Internet. This Court has long held that such regulations will align with the First Amendment, provided that they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations and internal quotation marks omitted). The law "need not be the least restrictive or least intrusive means of" combating the problem identified by the North Carolina's General Assembly. *Id.* at 798.

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[3] Tim Bynum et al., Center for Sex Offender Management, *Recidivism of Sex Offenders*, 6-7 (May 2001), http://www.csom.org/pubs/recidsexof.pdf.

[4] Michael Seto, *Internet Sex Offenders*, 109 (American Psychological Association, 2013).

North Carolina General Statute § 14-202.5 meets every prong of the test articulated by this Court in *Ward*. First, the statute is not content-based because it makes no distinction based upon the message the speaker conveys. Second, the law is narrowly tailored because it is not substantially broader than necessary to serve the significant government interest. Third, this Court has found ample alternative channels even when the restriction covers approximately ninety-five percent or more of the available area to communicate. *See Renton v. Playtime Theatres*, 475 U.S. 41, 53-54 (1986). This statute is not nearly as restrictive as the one at issue in *Renton* when one considers that "the content on the Internet is as diverse as human thought." *Reno v. A.C.L.U.*, 521 U.S. 844, 852 (1997) (footnote omitted).

That Packingham would rather use Facebook than another form of communication on the Internet is not determinative. This Court has long recognized that, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (citations omitted). This Court should apply the standard used in *Ward* and *Heffron* and find that Section 202.5 is a valid time, place, and manner restriction on the Internet use of registered sex offenders.

ARGUMENT

I. Section 202.5 is a reasonable time, place, and manner speech regulation.

A. North Carolina's statute is content-neutral.

The applicable standard of scrutiny hinges on whether the statute is content-neutral. North Carolina's statute is indeed content-neutral.

This Court recently held that content-based laws are those "that target speech based on its communicative content." *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2226 (2015) (citation omitted). A law targets the content of speech if the law applies because a certain topic is discussed or because a particular idea or message is expressed. *Id.* at 2227 (citations omitted). Section 202.5 is not content-based because it makes no distinction based upon the message a speaker conveys. *Id.* In other words, the jury did not need to look at the content of Packingham's message on Facebook to determine whether he violated the statute.

North Carolina's prohibition cannot be condemned on the ground that it applies only to a particular group of speakers because the narrow category of speakers affected by Section 202.5 reflects laudable tailoring rather than any intent to control content.

Not "all speaker-partial laws are presumed invalid." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 658 (1994). A speaker-partial law is considered content-neutral if the restrictions are based upon "the manner

in which speakers transmit their messages" and are "not a subtle means of exercising a content preference." *Id.* at 645.

North Carolina's law was not adopted because of a disagreement with any particular messages by sex offenders. Rather, North Carolina's interests in preventing crime led it to regulate where the speech at issue may occur. *See Hill v. Colorado*, 530 U.S. 703, 719 (2000). The North Carolina law "places no restrictions on – and clearly does not prohibit – either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a reasonable place restriction on an extremely broad category of communications with unwilling listeners." *Id.* at 723.[5] North Carolina's law was adopted to prevent crimes that arise as a result of sex offenders using social media; its restrictions are "justified without reference to the content of the regulated speech." *Boos v. Barry*, 485 U.S. 312, 320 (1988) (plurality) (citation omitted and emphasis deleted).

Because the law at issue only regulates the manner in which sex offenders communicate on the Internet and does not ban any particular subject or

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[5] The listeners in this case are similarly "unwilling," because Facebook has barred registered sex offenders from its site, unequivocally stating that it is an unwilling listener or, at least, an unwilling private forum. Pet. App. 23a; Resp. Br. in Opp. 23.

message, the law is content-neutral. Therefore, strict scrutiny does not apply here.[6]

B. Studies and experience confirm that Section 202.5 serves the substantial governmental interest in protecting children from sexual predators.

This Court has long held that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982). Consistent with that objective, the North Carolina General Assembly passed Section 202.5 to "facilitate the legitimate and important aim of the protection of minors from sex offenders who are registered" pursuant to state law. Pet. App. 11a.

North Carolina's law promotes its substantial governmental interest in preventing the sexual abuse of minors and would be achieved less effectively absent the regulation. *See Ward*, 491 U.S. at 799. Like many state legislatures, North Carolina's General Assembly has recognized "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." N.C. Gen. Stat. § 14-208.5; Pet. App. 61a; *see also Standley v. Town of Woodfin*, 661

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[6] Several courts reviewing similar laws concluded they are content-neutral. *E.g.*, *People v. Minnis*, 2016 IL 119563, ¶ 32-35 (Ill. 2016); *Doe v. Prosecutor*, 705 F.3d 694, 698 (7th Cir. 2013).

S.E.2d 728, 731 (N.C. 2008) (accepting and applying this finding of fact).

Although this Court undoubtedly exercises independent judgment on issues of constitutional law, "the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems." *Minnis*, 2016 IL 119563 at ¶ 41 (citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality); *Turner Broadcasting*, 512 U.S. at 665-666 (opinion of Kennedy, J., joined by Rehnquist, C.J., and Blackmun and Souter, JJ.)). That is why, even when assessing whether a statute violates the First Amendment, "courts must accord substantial deference to the predictive judgments of Congress." *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 195 (1997) (citations and internal quotation marks omitted).

The Court should therefore take the same approach as in *Kebodeaux*, where it found that there is "evidence that recidivism rates among sex offenders are higher than the average for other types of criminals," but that there is some conflicting evidence. The Court ruled that Congress has "the power to weigh the evidence and to reach a rational conclusion." 133 S.Ct. at 2503 (citation omitted). The same is true with respect to the North Carolina General Assembly's conclusion.

Not only do sex offenders pose a high risk of recidivism, but they also frequently victimize children on social media. Studies analyzing the recidivism of sex offenders and the victimization of children on the

Internet confirm that Section 202.5 promotes North Carolina's substantial governmental interest in preventing the sexual abuse of minors.

1. Sex offenders are likely to recidivate

Like Alaska in *Smith v. Doe*, North Carolina has concluded that convicted sex offenders pose a substantial risk of recidivism. 538 U.S. 84, 103 (2003); *see also* N.C. Gen. Stat. § 14-208.5; Pet. App. 63a-64a. The Court concluded in *Smith* that the Alaska Legislature's findings are "consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Id.* That risk of recidivism "is 'frightening and high.'" *Lile*, 536 U.S. at 34.

Painstaking undercover operations show that registered sex offenders are much more likely to commit crimes over the Internet compared to adult Americans as a whole. Registered sex offenders account for four to five percent of online solicitors of undercover police officers. Seto, *Internet Sex Offenders*, 183. Because sex offenders comprise only tiny fraction of adult Americans, a registered sex offender is approximately 12.5 to 15.63 times more likely than any other adult American to solicit an undercover officer.[7] In other words, there

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[7] Registered sex offenders represent about one-third of one percent of the adult population in America. *See* Parents for Megan's Law and The Crime Victims Center, *Number of Registrants Reported by State/Territory*, https://www.parentsformeganslaw.org/public/meganReportCard.html (last visited Jan. 18, 2017) (there are approximately 805,781 American registered sex offenders);

is very good reason to believe that registered sex offenders will sexually solicit children online.

North Carolina and this Court had good reasons to conclude that recidivism by sex offenders is high. A five-year follow-up study found that, of persons who had committed child molestation, fifty-three percent of same-sex offenders and forty-three percent of opposite-sex offenders had already been convicted of previous sex offenses. Bynum, *Recidivism of Sex Offenders*, 8-9. That same study showed that same-sex child molesters had a reconviction rate of thirty percent and opposite-sex child molesters had a reconviction rate of twenty-five percent. *Id.* Another study showed that thirty-one percent of extra-familial child molesters were reconvicted of a second sexual offense within six years. *Id.* Further, the risk of recidivism does not go away with time. *Id.* at 6-7. One study showed that, over a

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United States Census Bureau, *Quick Facts*, https://www.census.gov/quickfacts/table/PST045216/00 (last visited Jan. 18, 2017) (there are about 323,127,513 Americans, of which 22.9% are adults and 77.1% are not). By the States' math (323,127,513 X .771 = 249,131,313) and (805,781 / 249,131,313 = 0.0032), about one-third of one percent of adult Americans are registered sex offenders.

That means that a registered sex offender is approximately 12.5 to 15.63 times more likely than any other adult American to solicit an undercover officer. If there was no relationship between persons who are registered sex offenders and online solicitors, then we would assume that registered sex offenders account for only one-third of one percent of online solicitors. However, they account for four to five percent of online solicitors. To determine the amount of the resulting disparity, the numbers used above are reflected by the following equations: .04 / .0032 = 12.5 and .05 / .0032 = 15.625.

twenty-five year period, fifty-two percent of child molesters and thirty-nine percent of rapists were rearrested. *Id.*

2. Children are targeted on social media

The General Assembly accurately identified social media sites as a place where child victimization routinely occurs. The *Journal of Adolescent Health* published a study in 2010 that showed that social networking sites, such as MySpace and Facebook, played a role in thirty-three percent of all types of internet-related sex crimes against minors that culminated in an arrest. Mitchell, *Use of Social Networking Sites in Online Sex Crimes Against Minors: An Examination of National Incidence and Means of Utilization*, 1, 3. Of those arrests involving social networking, eighty-two percent of the time offenders used social networking sites to access information about the victim's likes or interests, sixty-five percent used those sites to learn about the victim's home or school, and twenty-six percent used those sites to learn where the victim was at a specific time. *Id.* at 3.

As one might expect, easy access to minors is one factor which increases the risk of reoffending. *See* Bynum, *Recidivism of Sex Offenders*, 12. One study found that seventy-one percent of teens (ages thirteen to seventeen) have online social networking profiles and half of those are visible and available to the public. Seto, *Internet Sex Offenders*, 109. Additionally, a United Kingdom survey of research revealed that

twenty-five percent of eight- to eleven-year-olds were using social networking websites, even though Facebook's terms of use prohibit access to those twelve and younger. *Id.* at 93. Of the teens, half or more had posted information on their profiles about where they attend school and stated they were not concerned about posting information online. *Id.* at 109. Teens do not only interact with people they know on social media; thirty-one percent respond to stranger contacts. *Id.* Social networking websites allow offenders to solicit a large number of minors in a relatively short amount of time with little risk of detection. *Id.* at 78. This gives sex offenders a greater chance of receiving a response to their online solicitation than exists if they were limited to finding victims in person. *Id.* at 73.

There are many reasons why social networking can be a dangerous place for sex offenders already predisposed to recidivate. Social networking websites allow people to establish relationships that were previously unlikely. The faceless nature of online communication minimizes relationship barriers and also reduces inhibitions.[8] Sex offenders on the Internet are likely to have reduced inhibitions towards previously restrained behavior because of the perception of anonymity. *Id.* The pool of potential victims also grows as

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[8] Robert J. O'Leary & Robert D'Ovidio, *Online Sexual Exploitation of Children*, The International Association of Computer Investigative Specialists, 4 (last visited Jan. 18, 2017), https://www.nga.org/files/live/sites/NGA/files/pdf/0703ONLINECHILD.PDF.

the offender is no longer restricted by physical barriers, such as geographical location. *Id.*

An example helps illustrate some of these particular problems. In June 2016, an Idaho sex offender was arrested for using Facebook to contact teenage girls and requesting to have sex with them.[9] A detective in Spokane, Washington investigated a report that the offender had sent sexually explicit images to a sixteen-year-old victim. The detective found that the offender had sent 18 unsolicited messages, four of which included pictures of his genitalia. The Spokane detective contacted authorities in nearby Coeur d'Alene because there are additional victims living in Idaho. The article ends with a plea for information because detectives believe there may be more victims. *Id.* One offender can quickly victimize many more people over social media than he would in person.

Social media is not only a dangerous place; crime that occurs there is hard to detect because, "[f]or a variety of reasons, sexual assault is a vastly underreported crime." Bynum, *Recidivism of Sex Offenders*, 3, 6. It is estimated that only thirty-two percent of sexual assaults against persons twelve or older are reported to law enforcement. *Id.* Researchers assume that the rate of underreporting for child sexual assault is the same. *Id.* The United States Department of Justice has

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[9] KXLY Spokane Coeur d'Alene, *Sex Offender arrested trying to entice teens on Facebook* (Nov. 20, 2016), http://www.kxly.com/news/local-news/sex-offender-arrested-trying-to-entice-teens-on-facebook/176518420.

stated that "[t]he assumption that sexual crimes against children and teenagers are underreported is now commonly accepted."[10] Internet-based crime is not different. When discussing the limitations of their study, researchers studying sex crimes that occur on social media list underreporting first. Mitchell, *Use of Social Networking Sites in Online Sex Crimes Against Minors: An Examination of National Incidence and Means of Utilization*, at 8.

As a logical consequence of underreporting, most sex crimes (seventy-three percent) that occur on social media that resulted in an arrest involved undercover law enforcement operations. *Id.* at 3. But practical limitations on the amount and effectiveness of undercover operations make them an inadequate substitute for a ban on access to social media.

A recent decision from Louisiana upholding a conviction under a statute similar to Section 202.5 provides a stomach-turning example. After meeting a sex offender on social media, a twelve-year-old child communicated with him, and that communication escalated into both of them exchanging sexually graphic videos. *State v. Murphy*, 2016-0901 (La. App. 1st Cir.

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[10] Robert A. Prentky et al., National Institute of Justice Research Report, *Child Sexual Molestation: Research Issues*, 1 (June 1997), https://www.ncjrs.gov/txtfiles/163390.txt; *see also* Office of Justice Programs, *Chapter 5: Adult Sex Offender Recidivism* (last accessed Jan. 3, 2017), https://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html. ("[R]esearchers widely agree that observed recidivism rates are underestimates of the true reoffense rates of sex offenders.") (Emphasis deleted).

10/28/16), ___ So.3d ___, 2016 La. App. LEXIS 1963, at *3-6. Unfortunately the child did not report the crimes to authorities and investigators were not able to intervene before the offender sexually abused her. *Id.* Like the Idaho sex offender discussed earlier, this case also involved multiple victims over social media. *Id.* at *5.

One 2006 study found that one in seven youths reported experiencing unwanted sexual solicitation within the past year, with thirty-nine percent of those solicitations coming from adults.[11] In an earlier (2000) study, the same researchers found that about one in five youths had received unwanted sexual solicitation online, with twenty-four percent of those solicitations from adults.[12] The studies also showed that minors received "aggressive" online sexual solicitation, in which the solicitor tried to make contact offline, at rates of four percent in the 2006 study and three percent in the 2000 study. Wolak, *Online Victimization of Youth: Five Years Later*, 1. In the more recent study, fifty-six percent of the youths did not tell anyone about the episode.[13]

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[11] *Online Victimization of Youth: Five Years Later*, 1, 17; *see also* Seto, *Internet Sex Offenders*, 74.

[12] Janies Wolak et al., *Online "Predators" and Their Victims*, University of New Hampshire, 1, 3 (June 2000), http://www.unh.edu/ccrc/pdf/Victimization_Online_Survey.pdf.

[13] *Id.* at 20. These two studies also show, again, that much of the data about online youth solicitation in underreported. *See* Seto, *Internet Sex Offenders*, 77; Wolak, *Online "Predators" and Their Victims*, 34.

According to another 2008 study, fourteen percent of tenth to twelfth graders (and nine percent of seventh to ninth graders) have accepted invitations to meet an online stranger in person.[14] Even when there is no offline contact, the costs of online sexual solicitation can still be severe. A "considerable" number of youth (twenty-seven percent) were asked to send sexual pictures of themselves to online sexual solicitors. Wolak, *Online Victimization of Youth: Five Years Later*, 23. This production of child pornography is another cost of the online solicitation of youth.

For all these reasons, the North Carolina General Assembly has a substantial – if not compelling – interest in eliminating social media use by specifically targeting persons who have previously committed a reportable sexual offense.

C. The means chosen by North Carolina are not substantially broader than necessary to achieve the government's interest.

North Carolina's regulation cannot be held invalid "simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 800. Rather, the time, place, and manner restriction must be "substantially broader than necessary" to be

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[14] Samuel C. McQuade III and Neel Sampat, Report of the Rochester Institute of Technology, *Survey of Internet and At-risk Behaviors*, 12, 16 (June 2008), http://scholarworks.rit.edu/cgi/viewcontent.cgi?article=2426&context=article.

struck down. North Carolina's law is not substantially broader than necessary and a narrower law would be far less effective. *Id.*

The fact that Lester Packingham's case is nondescript is proof of North Carolina's success. He was convicted of indecent liberties with a minor, a sex crime against a child. Pet. App. 22a. Packingham knew he was not allowed to access Facebook. Pet. App. 22a. He did so anyway and disguised his name. Pet. App. 2a, 22a. Showing that the post for which he was convicted was banal is beside the point. Pet. App. 20a. Packingham has not argued that he was using a false identity to find a job or express himself politically. Rather, the facts suggest poor impulse control, which is more indicative of recidivism rather than expressive activity. *See* Pet. App. 40a. While North Carolina has no gruesome facts to tell about this case, its actions (and the evidence that supports them) suggest that it protected society.

The General Assembly acted sensibly by not limiting its prohibition to registered sex offenders who used the Internet to commit their predicate sex crimes. Evidence shows that sex offenders who were convicted of sexual contact offenses (i.e., physical, hands-on sexual offenses) can also be involved in Internet sex offenses. One in eight online offenders (in this study the online offense was usually the commission of child pornography) have a previous official criminal record for a contact sexual offense at the time of their conviction. Seto, *Internet Sex Offenders*, 180.

A frightening example of a contact offender later using the Internet to recidivate is not hard to find. Late last year, a twice-convicted rapist in South Memphis, Tennessee was arrested for pretending to be a teenage boy on Facebook and using the website to message a young, teenage girl.[15] In 2005 the offender was a manager at a Taco Bell and raped a sixteen-year-old employee. Months later, he sexually assaulted another sixteen-year-old on her first day of work. We can all empathize with the man who lives down the street who explains that "Here in the neighborhood, it's upsetting." *Id.*

North Carolina's law is also not substantially broader than necessary merely because its prohibition applies to both sex offenders that victimized children and sex offenders that victimized adults. As North Carolina explains, research shows that rapists who victimize adults often also sexually victimize children. Resp. Br. 40-41. Although the result is counter-intuitive, "research suggests that many [sex] offenders have histories of assaulting across genders and age groups, rather than against only one specific victim population." Bynum, *Recidivism of Sex Offenders*, 7, n. 2. North Carolina therefore had a sound basis upon which to include offenders who have previously committed a reported sex crime only against an adult.

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[15] Jessica Gertler, WREG Memphis, *Violent sex offender accused of messaging 13yo girl on Facebook* (Nov. 1, 2016), http://wreg.com/2016/11/01/violent-sex-offender-accused-of-messaging-13yo-girl-on-facebook/.

The law is also not unconstitutional on the ground that many Internet sex crimes do not occur on social media. North Carolina cannot be faulted here because it followed the "sound theory that a legislature may deal with one part of a problem without addressing all of it." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) (citation omitted).

The General Assembly also properly chose not to base its prohibition of sex offenders using social media upon an individualized inquiry. Even many *persistent* sex offenders receive low risk assessment scores on tests designed to gauge recidivism risk. *See* Bynum, *Recidivism of Sex Offenders*, 5. One possible explanation for this phenomenon is that sexual offending differs from other criminal behavior and these screenings are not adequately tailored to the unique factors associated with sexual re-offending. *See id.* Although North Carolina could conceivably limit its statute to persons who, "due to a mental abnormality or a personality disorder, are likely to engage in predatory acts of sexual violence," there is no reason to believe that recidivism is unique to those offenders and, consequently, no basis to believe that the statute would be nearly as effective if it were so limited. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (internal quotation marks and citation omitted).

Content-neutral time, place, and manner speech regulations do not require the least restrictive means available. *Ward*, 491 U.S. at 798. Simply because North Carolina "could have written" a law with "a less severe effect on expressive activity" does not mean that doing

so is constitutionally mandated, nor is it clear that some of Packingham's "suggested exceptions would even be constitutionally permissible." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815-816 (1984); *see* Pet. Br. 53-54. For example, North Carolina might not be able to require website operators to ensure that teenage account holders obtain adult permission prior to establishing accounts because of the preemptive power of the Communications Decency Act. *See* 47 U.S.C. § 230(C)(1); Pet. Br. 51.[16]

Packingham argues that North Carolina cannot serve its stated interest in preventing registered sex offenders from harvesting information about potential victims by prohibiting all social media use because the criminal behavior is only a possible byproduct of social media use. Pet. Br. 44-45. For this argument, he relies principally upon *Frisby v. Schultz* to support his argument. 487 U.S. 474, 485-486 (1988). However, that case is limited to restrictions that ban an entire medium: "A *complete* ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Id.* (emphasis added). This Court requires a greater showing by the government when it bans an entire method of communication. However, that is not what North Carolina has done here. North Carolina did not ban Internet usage or expression.

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[16] Many Courts have held that this law preempts state criminal laws, as well as federal and state civil actions. *See, generally*, Monica DeLateur, *From Craigslist to Backpage.com: Conspiracy as a Strategy to Prosecute Third-Party Websites for Sex Trafficking*, 56 Santa Clara L. Rev. 531, 550-554 (2016).

North Carolina's law is therefore subject to the more forgiving test requiring that the law not be *substantially* broader than necessary. *See Ward*, 491 U.S. at 800. The word substantially implies, of course, that a law can be broader than absolutely necessary.

When determining how much latitude to give States when determining the breadth available to them to solve a problem, the seriousness of the crime at issue should matter in some small degree. The First Amendment is not interpreted solely as a series of logical abstractions, but with the real world in mind. This statute does not involve littering. *Schneider v. State*, 308 U.S. 147, 162 (1939). Nor does it involve burglary. *Martin v. City of Struthers*, 319 U.S. 141, 144 (1943). The devastation caused by online solicitation can lead to child sexual abuse and rape. *See Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008). Comparing North Carolina's interests in this case to the prevention of littering and burglary makes little sense. *See* Pet. Br. 44. As the Illinois Supreme Court recently put it, Packingham fails to recognize the breadth necessary to protect the public. *See Minnis*, 2016 IL 119563, at ¶ 46.

If North Carolina's law (and others like it) are struck down, the effect will be more child sexual abuse. Even the most zealous defenders of the First Amendment recognize that "inclinations of humanity" can

"overcome the somewhat more abstract devotion to the First Amendment."[17]

D. Ample alternative channels are open to Packingham.

Packingham has the burden of proving that ample alternative channels do not exist in order for the statute to be struck under the *Ward* test. *See Ward*, 491 U.S. at 802 (citations omitted). This Court denied the challenge in that case because "there has been no showing that the remaining avenues of communication are inadequate." *Id.*[18] It did not state that the challenge was denied because the government proved that ample alternatives were available.

Packingham has not proven that he cannot cheaply communicate his views to the world on the Internet; nor is there any vast swath of information that will be kept from him. "It is common knowledge that alternative channels for communication over the Internet are abundant." *See Vo v. City of Garden Grove*, 9 Cal. Rptr. 3d 257, 272 (Cal. Ct. App. 2004). The Internet is as varied as human expression itself, even

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[17] Oral Argument, *New York Times Co. v. United States* (Pentagon Papers), 403 U.S. 713 (1971), in 71 *Landmark Briefs and Arguments of the Supreme Court of the United States*, 239-240 (Philip B. Kurland & Gerhand Casper eds. 1975) (response of Counsel for the New York Times, Alexander M. Bickel, to a question from Justice Potter Stewart).

[18] *See, e.g.*, *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 294 (6th Cir. 1998) (reading *Ward* such that the challenger must show the inadequacy of available alternative channels).

without all of the websites listed in the briefing before this Court by all of the parties. *See Reno*, 521 U.S. at 852.

When determining whether ample alternative channels for communication exist, this Court has upheld a restriction that prohibited an adult theater from residing in about ninety-five percent of the available area in Renton, Washington. *See Renton*, 475 U.S. at 53. The adult theater complained that the remaining five percent or so was almost entirely occupied and there were no commercially viable sites. *Id.* This Court rejected the adult theater's arguments and held that the ample alternative channels need only provide "a reasonable opportunity" to participate in the First Amendment activity at issue. *Id.* at 54. The Court specifically rejected the notion that the fact that the adult theater would have to pay more to operate made the alternative channels insufficient. There is no showing that the restrictions on Packingham's legitimate expression and information gathering are nearly as severe.

Nor can this Court strike down North Carolina's statute because Packingham cannot use his preferred method of expression. Although *Renton* was a secondary effects case, rather than one with a time, place, and manner restriction, the ample alternative channels requirement in both tests should be no different. Under *Renton*, the First Amendment requires that North Carolina refrain only from effectively denying petitioner a reasonable opportunity to speak and learn in a similar

manner as he would on social media sites; North Carolina's law easily meets that requirement. *Id.*

Simply because Packingham cannot use a popular forum (one whose terms of service bar him) does not mean that the statute fails to provide ample alternative channels: "An adequate alternative does not have to be the speaker's first or best choice, *see Heffron*, 452 U.S. at 647, or one that provides the same audience or impact for the speech."[19]

Packingham principally relies (at 54-56) on *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994). But that case dealt with a means of communication that was "unique," "important," and "may have no practical substitute." *Id.* at 54, 57. While communication over the entire Internet might fit these criteria, social media does not and Packingham has not shown otherwise. *See* Pet. App. 16a-17a.

This Court has explained that the "wide variety of communication and information retrieval methods" on the Internet "[t]aken together . . . constitute a unique medium." *Reno*, 521 U.S. at 851. The *Reno* decision did not suggest that e-mail or listservs were entire mediums of communication unto themselves. *Id.* There is a good reason for this; the methods of communication over the Internet "are constantly evolving and difficult to categorize precisely." *Id.*

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[19] *Gresham v. Peterson*, 225 F.3d 899, 906-907 (7th Cir. 2000) (citing *Ward*, 491 U.S. at 802; *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 809 (1985)).

There has been extensive disagreement between the parties regarding whether North Carolina's statute covers true social networking websites or whether it covers an array of sites that do not primarily facilitate the social introduction of persons. The two main sites at issue appear to be Amazon.com and NYTimes.com. The better reading of the statute would be to exclude them from the statute's prohibition.

The primary purpose of Amazon.com is to facilitate commercial transactions. *See* N.C. Gen. Stat. 14-202.5(c)(2).[20] It is a member of its own website because the company itself acts as a vendor of goods and also provides a platform for third-party vendors. *See* N.C. Gen. Stat. 14-202.5(c)(2).[21] Therefore, the commercial transactions on Amazon.com involve the sale of goods from members to visitors and, therefore, Packingham may visit the site. *See* N.C. Gen. Stat. 14-202.5(c)(2).

The websites of both the New York Times and Amazon.com are also excluded from the statute's prohibitions because they do not allow users to *link* their profiles/pages to "other personal Web pages on the commercial social networking Web site of friends or

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[20] *See* Greg Bensinger, The Wall Street Journal, *Amazon Posts Another Blockbuster Profit: The latest quarter is Amazon's fifth-straight period in the black*, http://www.wsj.com/articles/amazon-posts-another-blockbuster-profit-1469736704 (July 28, 2016).

[21] *See* CNBC, *Amazon doubles deliveries in 2016 for third-party sellers*, http://www.cnbc.com/2017/01/04/amazon-doubles-deliveries-in-2016-for-third-party-sellers.html (Jan. 4, 2017) ("Chief Executive Jeff Bezos has said that close to 50 percent of the units purchased on Amazon come from third-party vendors.")

associates of the user . . . [such that the link] may be accessed by other users or visitors to the Web site." *See* N.C. Gen. Stat. 14-202.5(b)(3). The first portion of the paragraph requires the following: the commercial social networking website must allow "users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user." *See* N.C. Gen. Stat. 14-202.5(b)(3). The phrase "such as" only refers to the information contained within the user's profile/page. The requirement that the page link with other pages is the best construction of the statute.

Linkedin is not the only major job search website and Twitter is not the only place to read up-to-the-minute news. For example, Indeed.com (another job search site) would not be covered because, among other reasons, the user cannot link a personal profile/page "to other *personal* Web pages . . . that may be accessed by other users or visitors" on Indeed.com. *See* N.C. Gen. Stat. 14-202.5(b)(3) (emphasis added).[22] A job-seeker on Indeed.com does not create an accessible *link* between the seeker's profile/page with another "personal" page. For the same reasons that the New York Times is not covered by the statutes, other major news outlets such as Reuters and USA Today would also not be covered.

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[22] Indeed Blog, *Indeed Hits Record 200 Million Unique Visitors* (Feb. 8, 2016), http://blog.indeed.com/2016/02/08/indeed-200-million-unique-visitors/.

To the extent this Court believes these issues to be close and relevant, it must read the statute in a manner to preserve its constitutionality. The constitutional-doubt canon "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 247-248 (Thomson/West, 2012) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

II. States use different methods to address the problem of recidivist sex offenders on social media.

North Carolina's statute is one of many attempting to address the serious threat to minors addressed above. This Court should be cautious to intervene in North Carolina's attempt to stay experimentation of this social legislation. "[O]ne of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Even in the context of criminal constitutional law, this Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009) (citation omitted).

In light of this principle, there is likely no single correct method to deal with the serious problem of sex offender recidivism over social media. As this Court has held, the validity of a time, place, and manner regulation "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *Ward*, 491 U.S. at 800 (citations and internal quotation marks omitted). As shown below, States have restricted convicted sex offenders' ability to use social media in a variety of ways. Rather than putting them up against each other and demanding that only the least-speech-restrictive one survives, the States should be permitted to continue to experiment – at least until a solution is found.

1. Two jurisdictions have enacted laws similar to Section 202.5.

Louisiana bars registered sex offenders who committed a prior sex crime against a child or video voyeurism from creating a profile on a social networking website or attempting to contact other users of the social networking website. La. Rev. Stat. Ann. 14:91.5(A)(1), (B)(3). Louisiana's law limits prohibited websites to those that have the primary purpose of facilitating social interaction, and it contains exceptions for news-disseminating and governmental websites. La. Rev. Stat. Ann. 14:91.5(B)(2)(a), (B)(2)(b)(iii), (B)(2)(b)(iv). Those registered sex offenders who are not covered by La. Rev. Stat. Ann. 14:91.5 may use social media but

must post a notice on their social networking site pursuant to La. Rev. Stat. Ann. 15:542.1(D).

Guam has a similar provision has well. It prohibits all registered sex offenders from accessing social networking websites, instant messaging websites, or chat room if the site permits persons less than eighteen years of age to create a personal web page unless the site restricts the ability of adult members to add minors as connections. 9 GCA § 89.03(i).

2. Most States – including North Carolina, Louisiana, and Guam – require convicted sex offenders to provide their Internet identifiers to law enforcement. For example, Illinois requires sex offenders to publicly disclose and periodically update information regarding their Internet identities and websites, which would include social media profiles. *See Minnis*, 2016 IL 119563, ¶ 1 (citing 730 ILCS 150/3(a); 730 ILCS 152/101 *et seq.*). In *Minnis*, the Illinois Supreme Court rejected the argument that the law violated the First Amendment. *Id.* at ¶ 49.[23] Courts in Pennsylvania, Utah, and Indiana have upheld similar statutes, finding that the First Amendment does not prohibit registrants from being required to give state officials their Internet identifiers. *Coppolino v. Comm'r of the Pa. State Police*, 102 A.3d 1254 Pa. Cmwlth. Ct. 2014), *aff'd*, 125 A.3d

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[23] The *Minnis* Court largely disagreed with cases enjoining similar Georgia, Nebraska, and California requirements. *Id.* at ¶ 46-47 (discussing *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012); *White v. Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010); *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014)). California's law was recently amended. 2016 Cal. SB 448.

1196 (Pa. 2015); *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010), *cert. denied*, 131 S.Ct. 1617 (2011); *Harris v. State*, 985 N.E.2d 767 (Ind. App. 2013).

The majority of States (and some territories) have similar provisions which require submission of Internet identifiers by all registered sex offenders.[24]

Three other states require the submission of Internet identifiers for only a subset of registered sex offenders. Cal. Penal Code § 290.015(a)(4); Cal. Penal

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[24] Ala. Code § 15-20A-7(a)(9); Alaska Stat. § 12.63.010(b)(1)(I); Ariz. Rev. Stat. § 13-3821(I) and (S)(2); Ark. Code Ann. § 12-12-906(g)(3)(Q) and (h)(3)(Q); Del. Code Ann. tit. 11, § 4120(d)(2); Fla. Stat. Ann. § 775.21(2)(j) and (6)(a)(1); 9 GCA § 89.03(b)(4)(H) (Guam); Haw. Rev. Stat. Ann. § 846E-2(d)(5); 730 ILCS 150/3(a); Ind. Code Ann. § 11-8-8-8(a)(7); Iowa Code § 692A.101(15) and (23)(a)(9); Iowa Code § 692A.108(1); Kan. Stat. Ann. § 22-4907(a)(19); La. Rev. Stat. Ann. § 15:542(C)(1)(m); Md. Code Ann., Crim. Proc. § 11-706(a)(7); Mich. Comp. Laws Serv. § 28.727(1)(i) (some social media websites, like Facebook, include an instant messaging function); Miss. Code Ann. § 45-33-25(2)(w); Mo. Rev. Stat. § 589.407(1)(1); Mo. Rev. Stat. § 43.650(4)(10); Mo. Rev. Stat. § 43.651(1)(4); Mont. Code Ann. § 46-23-504(3)(h); N.C. Gen. Stat. § 14-208.7(b)(7); N.H. Rev. Stat. Ann. § 651-B:4-a; N.M. Stat. Ann. § 29-11A-4(B)(8); N.M. Stat. Ann. § 29-11A-3(J); N.Y. Correct. Law § 168-b(1)(a); N.Y. Correct. Law § 168-a(18); Ohio Rev. Code Ann. § 2950.04(C)(10); Okla. Stat. tit. 57, § 584(A)(9); 42 Pa. Cons. Stat. Ann. § 9799.16(b)(1) and (b)(2); 4 L.P.R.A. § 536c; S.C. Code Ann. § 23-3-555(A)(3) and (B)(1); S.D. Codified Laws § 22-24B-8(13); Tenn. Code Ann. § 40-39-203(i)(17); Tex. Code Crim. Proc. Art. 62.051(c)(7); Tex. Code Crim. Proc. Art. 62.001(12); Utah Code Ann. § 77-41-105(8)(i) and (8)(j); Utah Code Ann. § 77-41-102(12); Va. Code Ann. § 9.1-903(B); 14 V.I.C. § 1726(b)(7); W. Va. Code § 15-12-2(d)(8); Wis. Stat. § 301.45(2)(a)(6m); Wyo. Stat. Ann. § 7-19-302(a)(xii).

Code § 290.024(a); Colo. Rev. Stat. § 16-22-108(2.5)(a); Conn. Gen. Stat. § 54-251(a).

3. Finally, many States impose by statute limits on Internet use as a condition of sex offenders' probation or parole. For example, New Jersey subjects certain registered sex offenders to lifetime supervision "as if on parole" and, as a condition of release, registrants *must* agree to refrain from Internet use unless the registrant has prior approval from the court or, if the Internet use is related to an employment search, obtained prior approval from the offender's parole officer. *See J.I. v. N.J. State Parole Bd.*, 120 A.3d 256, 259 (Super. Ct. App. Div. 2015), *cert. granted*, 127 A.3d 701 (N.J. 2015); N.J.S.A. 30:4-123.59(b)(2)(a); N.J.S.A. 2C:43-6.4(f)(1).[25] There are other mandatory and discretionary prohibitions upon Internet use. *See* N.J.S.A. 30:4-123.59(b)(2). Most pertinent here, the New Jersey State Parole Board adopted a general condition, N.J.A.C. 10A:71-6.11(b)(23), which prohibits all lifetime registrants "from using any computer and/or device to create any social networking profile or to access any social networking service or chat room in the offender's name or any other name for any reason unless expressly authorized. . . ." *See also J.I.*, 120 A.3d at 262. The intermediate court of appeals upheld the social networking condition as facially constitutional and

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[25] The New Jersey Supreme Court has agreed to consider this case, but an opinion has yet to be issued. New Jersey Courts, *Track Supreme Court Appeals*, https://www.judiciary.state.nj.us/calendars/sc_appeal.html (last updated Jan. 9, 2017) (noting that the case was argued on Nov. 7, 2016 but has not been decided).

constitutional as applied under the First Amendment. *Id.* at 263-265.

Nevada prohibits registered sex offenders on probation or parole from accessing the Internet unless possession of an Internet-capable device is approved by the offender's probation or parole officer. Nev. Rev. Stat. Ann. § 176A.410(1)(q); Nev. Rev. Stat. Ann. § 213.1245(1)(p).

New York mandatorily prohibits access to a commercial social networking website when a sex offender has been sentenced to probation or conditional discharge and either the victim of the sex offense was under the age of eighteen at the time of the offense or, in some cases, where the Internet was used to facilitate the commission of the crime. *See* N.Y. Penal Law sec. 65.10(4-b). The law also prohibits communications made

> for the purpose of promoting sexual relations with persons under the age of eighteen, and communicat[ions] with a person under the age of eighteen when such offender is over the age of eighteen, provided that the court may permit an offender to use the internet to communicate with a person under the age of eighteen when such offender is the parent of a minor child and is not otherwise prohibited from communicating with such child.

N.Y. Penal Law § 65.10(4-b). Minnesota and Texas have probation or parole restrictions that are similar to New York's prohibition. Minn. Stat. § 244.05(6)(c); Tex. Gov't Code Ann. § 508.1861(b).

Like New York and Texas, Indiana specifically prohibits contact between certain sex offenders and minors. If a sex offender in Indiana violates a condition of probation, parole, or rule of a community transition program that prohibits communication with a child less than sixteen years old using a social networking site, instant messaging site, or chat room program, the offender commits a misdemeanor. Ind. Code Ann. § 35-42-4-12(b).

Some States also require the offender on probation or parole to consent to law-enforcement searches of all Internet-capable devices, as well as monitoring of those devices, while on probation or parole. *E.g.*, Ind. Code Ann. § 11-8-8-8(b); N.J.S.A. 2C:43-6.4(f)(2) and (f)(3).

Petitioner's approach calls into question many of these laws. A plurality of this Court had a better approach: the government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976) (plurality).

CONCLUSION

The judgment of the Supreme Court of North Carolina should be affirmed.

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Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Criminal Defense Lawyers ("NACDL") submits this brief as *amicus curiae* in support of petitioner.[1]

INTEREST OF *AMICUS CURIAE*

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have provided blanket consent to the filing of *amicus* briefs in support of either party or neither party.

present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case as NACDL is committed to combatting the proliferation of collateral consequences that deprive convicted persons of fundamental rights without a sound basis in law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The provision at issue in this case, North Carolina General Statute § 14-202.5, makes it a felony for persons on the state's sex offender registry to "access" any social networking website, if the person knows that individuals under the age of 18 are permitted to use the site. In relevant part, the statute defines a "social networking Web site" as one that "[f]acilitates the social introduction between two or more persons for the purpose of . . . information exchanges," allows users to create "personal profiles," and provides users "mechanisms" for communication. N.C. Gen. Stat. § 14-202.5(b).

Petitioner J.R. Packingham was convicted under § 202.5 for posting a message on Facebook praising God for the dismissal of a traffic ticket. The Supreme Court of North Carolina upheld petitioner's conviction against his constitutional challenge, holding that any burden imposed on petitioner's First Amendment rights was no greater than necessary to further the government's interest in protecting children.

Section 202.5 is one of a growing number of federal and state laws that effectively impose criminal punishments outside the normal, individualized

criminal sentencing process, categorically stripping citizens of constitutional rights with little or no effort to tailor the restraints they mandate to the objectives they purport to serve. These punishments in many instances would not survive due process review even if they were explicitly imposed as actual sentences on identified individuals for specific criminal conduct. As "hidden sentences"[2] mandated for a broad range of conduct, with no necessary connection to the conduct they punish, the due process violation is all the more palpable, and all the more intolerable.

A recent NACDL report catalogs and critiques the trend toward expanding criminal punishment outside the sentencing process, even though the sentencing process has not proved to be in any way deficient in identifying punishments that "fit the crime." *See* NACDL, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime—A Roadmap to Restore Rights and Status After Arrest and Conviction* (May 2014).[3] This case presents an opportunity for the Court to clarify the constitutional limitations on these hidden sentences—not just the First Amendment-based limitations on the government's power to punish speech that make speech-restrictive laws like § 202.5 particularly vulnerable to constitutional challenge, but the more general limitations that constrain the government's power to impose *any* criminal punishment.

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[2] *See* Joshua Kaiser, Comment, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to "Collateral" Punishment Policy*, 10 Harv. L. & Pol'y Rev. 123, 126-27 (2016).

[3] https://www.nacdl.org/reports/.

Collateral consequence laws like § 202.5 raise multiple concerns about whether the punishments they mandate comport with basic due process. First, NACDL is unaware of any evidence—much less valid findings—that the normal criminal sentencing process cannot fully serve the governmental interests underlying the extra-sentencing punishments imposed by collateral consequence laws. If sentencing itself already serves the government's objective, then extra-sentence punishments will be difficult to justify as necessary and appropriate to serve the same objectives.

Second, unlike criminal sentences, which are established for specific crimes and usually are calibrated to the particular facts of the offense and the individual convicted of it, collateral consequence laws generally operate categorically, mandating punishments for large groups of people convicted of a wide range of offenses involving vastly different conduct. For instance, some states broadly bar all persons deemed "sex offenders" from entering libraries in order to protect children, even if the offender's own sex-related crime involved only adults and indicates no greater risk to children than any other crime.

Third, collateral consequence laws are often strict liability offenses—like § 202.5—that impose criminal punishment for specified acts even when the defendant intended no harm. Strict liability offenses traditionally have been limited to regulatory crimes, where the proscription is designed to protect public health and safety. To justify a collateral consequence law on public safety grounds, the law must be carefully drawn to advance that specific regulato-

ry purpose. Many such laws, including § 202.5, are not so circumscribed and thus cannot be defended as merely advancing a rational public welfare objective.

ARGUMENT

The vast expansion of the nation's criminal justice system over the last 40 years has produced a corresponding increase in the number of people with a criminal record. Between 1980 and 2014, the number of Americans incarcerated in state and federal prisons quintupled,[4] and one recent study estimates that 65 million people—roughly one in four adults in the United States—have a criminal record.[5]

For many people who have been convicted of a crime, "the most severe and long-lasting effect of conviction is not imprisonment or [a] fine." Gabriel Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1791 (2012). Rather, it is the collateral consequences that follow from the conviction and persist even after their sentence has been served. *Id.*; *see* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 Notre Dame L. Rev. 301, 315 (2015) (collateral consequences may "dwarf an offender's actual sentence in severity or significance").

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[4] *See* The Sentencing Project, *Fact Sheet—Trends in U.S. Corrections* (2015), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

[5] Nat'l Emp't Law Project, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, at 27 n.2 (March 2011), http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1.

There are approximately 48,000 laws and rules in U.S. jurisdictions that restrict opportunities and benefits based on criminal convictions. *See* ABA, *National Inventory of Collateral Consequences of Conviction*, (hereinafter "*ABA Inventory*") www.abacollateralconsequences.org/map/.[6] These collateral consequences affect "virtually every aspect of human endeavor, including employment and licensing, housing, education, public benefits, credit and loans, immigration status, parental rights, interstate travel, and even volunteer opportunities." NACDL Report at 12. They bar individuals with criminal records from holding "public positions, from teachers and law enforcement officers to school bus drivers and garbage collectors," and from working in professions "that require licenses—including not only doctors and lawyers, but also barbers, bartenders, plumbers, and beauticians." Kaiser, *supra*, at 133. They deprive people of their rights to vote, to serve on a jury, and to keep and bear arms, and render them ineligible to enlist in the armed forces. *Id.* at 138; U.S. Dep't of Justice, Office of the Pardon Attorney, *Civil Disabilities of Convicted Felons: A State-by-State Survey*, at 6-7, 14 (2d ed. 1996), https://www.ncjrs.gov/pdffiles1/pr/195110.pdf. And

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[6] Some similar consequences can be activated by a mere arrest. *See* Tracy WP Sohoni, *The Effect of Collateral Consequence Laws on State Rates of Returns to Prisons*, at 6 (2013), https://www.ncjrs.gov/pdffiles1/nij/grants/247569.pdf. Others attach even to non-criminal offenses such as disorderly conduct. *See, e.g.*, McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. Tol. L. Rev. 479, 482 (2005) (noting that such a violation "makes a person presumptively ineligible for New York City public housing for two years").

through provisions like § 202.5, individuals convicted of certain types of crimes—like those categorized as "sex offenses"—may find themselves subject to laws broadly restricting their freedom of movement, residency, and employment, Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Non-custodial Prevention*, 99 Cornell L. Rev. 327, 362 (2014), and denying them lawful access to everyday websites like Amazon, Google, and *The New York Times*, Pet. App. 33a, 51a.

These collateral consequences can have a profound impact on the lives of those to whom they apply. A single individual with a criminal conviction may be subject to more than 2,000 such restrictions upon reentry. Kaiser, *supra*, at 157. And while some collateral consequences are temporary, most are not. *See id.* at 148. The stakes are extraordinarily high for the millions of individuals who are subject to these post-conviction restraints, and this Court's guidance is needed to ensure that such provisions do not exceed constitutional bounds.

A. The Sentencing Process Already Serves The Objectives Underlying Many Collateral Consequence Laws

Although collateral consequences "technically reside outside of the criminal justice system," Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. Crim. L. & Criminology 1213, 1218 (2010), many are plainly punitive in character, *see* Chin, *supra*, at 1830. "Taking away someone's right to vote because they were convicted of a crime," for example, "does not serve any non-punitive, regulatory purpose, such as making society

safer or protecting against voter fraud." NACDL Report at 34; *see also id.* at 14 (observing that many common collateral consequences, including the loss of voting and other civil and judicial rights, "serve no public safety purpose at all"). Provisions denying those convicted of drug offenses access to public benefits like food stamp programs likewise appear to be motivated primarily (or entirely) by a desire to punish that group. *See* The Sentencing Project, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, at 1 (2015).[7] Such provisions, in effect, amount to "invisible ingredients in the legislative menu of criminal sanctions." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion, in Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 15, 17 (Marc Mauer & Meda Chesney-Lind eds., 2002).

Punishing wrongdoing is of course an important governmental objective, but fulfilling that objective is generally the office of the criminal *sentencing* process. The sentence imposed for a particular individual and offense reflects a judgment about what restrictions and penalties are necessary to achieve sentencing's traditional purposes: deterrence, incapacitation, rehabilitation, and retribution. *See* Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harv. L. & Pol'y Rev. 173, 176-77 (2010). Indeed, in the federal system, judges are expressly instructed to "impose a sentence sufficient, but not greater than necessary" to achieve the

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[7] http://sentencingproject.org/wp-content/uploads/2015/12/A-Lifetime-of-Punishment.pdf.

aims of sentencing: "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a). The same principle underlies sentencing at the state level. *See* Alison Shames, Vera Institute of Justice, *Sentencing Within Sentencing*, 24 Fed. Sent'g Rep. 1, 1 (Oct. 2011) (observing that "in most states, the imposition of a sentence is a regulated process," and—"in all cases—sentence severity is reviewable by a higher court, to ensure that a judge does not impose a penalty that is more than necessary to achieve the accepted goals").

Given that the criminal sentencing process exists solely to serve society's interest in punishing wrongdoing, it should be exceedingly difficult to justify a regime of *extra*-sentence punishments absent substantial evidence that the sentencing process is deficient in some material respect. At the very least, the substantial overlap between sentencing objectives and the purposes animating collateral consequence laws should prompt close scrutiny of post-sentence restrictions, including careful evaluation of whether and how they serve any distinct interest not already fully vindicated in the sentencing process.

B. Unlike The Sentencing Process, Many Collateral Consequence Laws Impose Restrictions Absent Any Consideration Of The Specific Offense Or The Individual Convicted Of It

While many collateral consequence laws share sentencing's aims, they are typically far less precise than the traditional sentencing process in how they go about advancing those goals.

Not only does the criminal sentencing process generally serve society's interest in punishing wrongdoing (as just discussed), it does so by identifying a punishment that is tailored to the particular offense and offender involved. The criminal sentencing process "is designed to impose punishment that is proportionate to the offense." Chin, *supra*, at 1830. It is a "bedrock principle of our sentencing jurisprudence . . . that the severity of the criminal sanction should be limited by the seriousness of the offense and relevant attributes of the offender." Travis, *supra*, at 35. Generally speaking, the more serious and blameworthy a defendant's conduct, the more severe the penalty imposed. And it is not enough that the punishment fit the crime—it also "should fit the offender." *Williams v. New York*, 337 U.S. 241, 247 (1949); *see Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."). To ensure that it does, the sentencing process is largely individualized, taking into account

the particular facts and circumstances of the crime and the particular attributes of the defendant.

To be sure, over the last several decades, there has been a shift at both the state and federal levels toward structured sentencing schemes aimed at normalizing sentences across defendants. *See* Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 L. & Contemp. Probs. 161, 162 (2013). But even where the range of available sentences is constrained by statute or guidelines, ordinary criminal sentences are still at a minimum attached to specific crimes that share common attributes. And sentencing tables, "with charge severity on one axis and prior criminal record on the other," are "concrete expressions" of the principle that punishment should be tailored to both the offense and the offender. Travis, *supra*, at 35.[8]

In stark contrast to the crime- and offender-specific approach that prevails in the ordinary criminal sentencing context, collateral consequence laws often deprive people with criminal records of fundamental rights absent *any* individualized assessment of their conduct or even the general characteristics of the offense committed. Such laws place categorical restrictions on individuals convicted of a diverse ar-

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[8] Such tables are used both in federal sentencing, *see* U.S. Sentencing Commission, *Guidelines Manual*, Ch. 5, Pt. A, at 420 (Nov. 1, 2016), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf, and in many states, including North Carolina, *see* N.C. Court System, Punishment Grids, http://www.nccourts.org/Courts/CRS/Councils/spac/Sentencing/Punishment.asp.

ray of offenses, making no effort to match the punishment to the crime.

For example, many collateral consequences are triggered whenever someone has been convicted of a "felony," regardless of whether the conviction was for armed robbery, arson, or tax evasion. Such provisions include laws depriving millions of people of their rights to vote and possess a firearm. NACDL Report at 34-35; *see also* Travis, *supra*, at 35 ("A felon convicted of the lowest felony loses his right to vote, as does a serial murderer."). Other restrictions apply to those convicted of "crimes involving moral turpitude" or "crimes of violence," categories that likewise encompass a diverse range of conduct, from fraud to rape and extortion to murder. *See ABA Inventory* (database including numerous such provisions).

Even restrictions like § 202.5 that apply only to a group of individuals convicted of the same general type of offense (e.g., "sex offenses") still reach an assortment of underlying offenses involving widely varied facts. *See* N.C. Gen. Stat. § 14-208.6(4). In Oklahoma, for example, registered sex offenders range from persons convicted of violent sexual assaults to those convicted of indecent exposure, but regardless of the crime committed, all persons deemed "sex offenders" are "prohibited from living with a minor child; living within 2000 feet of any school, childcare center, playground, or park; loitering within 500 feet of any school, childcare center, or park; working in any capacity with children; engaging in ice cream truck vending; or living in a residence with another convicted sex offender." Daskal, *supra*, at 349-50 (footnotes omitted); *see also* Travis,

supra, at 35 ("A teenager convicted of statutory rape for consensual intercourse with his underage girlfriend, as well as a repeated child molester, may be subject to life-time registration.").[9] Such broad, categorical restrictions are the norm for these types of laws.

The expansive, often indiscriminate reach of collateral consequences represents an abandonment of the fundamental principle underlying the sentencing process—that punishment should be calibrated to match the characteristics of the crime.

C. Many Collateral Consequence Laws Create Strict Liability Offenses, Which Pass Constitutional Muster Only If They Are Carefully Drawn To Advance Public Safety Objectives

The extraordinary breadth of many collateral consequence laws also raises constitutional concerns because such laws are typically strict liability offenses that impose criminal punishment for specified acts even when the defendant intended no harm. Section 202.5, for example, criminalizes merely accessing a social networking site—broadly defined—without any consideration of whether the person who violated the restriction intended criminal activi-

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[9] If such a teenager later moved to North Carolina, he would be subject to both registration *and* § 202.5's restrictions, as North Carolina's registration requirements extend to individuals convicted of a registrable offense elsewhere, even if the same offense would not trigger registration had it been committed in North Carolina, *see* N.C. Gen. Stat. § 14-208.6(4), and § 202.5 broadly applies to everyone subject to registration under North Carolina law, *see id.* § 14-202.5(a).

ty. Under that law, an otherwise innocent exercise of free expression and religious liberty on Facebook becomes the basis for a Class I felony. *See* N.C. Gen. Stat. § 14-202.5(e).

Strict liability offenses are not favored in American law. Ordinarily, "a guilty mind is a necessary element in the indictment and proof of every crime." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quotation omitted); *see Morissette v. United States*, 342 U.S. 246, 250-51 (1952). That principle is so important that even where a criminal statute does not expressly include an intent element, this Court has applied a "background assumption" that the legislature did not intend to dispense with it if "to interpret the statute [without an intent requirement] would be to criminalize a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985).

The Court has recognized a narrow exception to the general *mens rea* rule for regulatory crimes, where the proscription is designed to protect public health and safety. *See Morissette*, 342 U.S. at 254; *see also Staples v. United States*, 511 U.S. 600, 607 (1994) ("Typically, our cases recognizing such [strict-liability public welfare] offenses involve statutes that regulate potentially harmful or injurious items."). "In the interest of the larger good," such provisions "put[] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943); *see United States v. Balint*, 258 U.S. 250, 252 (1922).

It is not enough, however, for the government simply to cite public safety as the justification for a post-sentence deprivation of constitutional rights. The government must do more than merely identify an interest that is "important in the abstract." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994). It must show that restrictions on constitutional rights "in fact alleviate" the cited harm "in a direct and material way" and are appropriately tailored to advance the objectives they purport to serve. *Id.* "[T]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity. . . . [T]hat inquiry embodies an overarching commitment to make sure that Congress has designed its statute to accomplish its purpose without imposing an unnecessarily great restriction on speech." *Reno v. ACLU*, 521 U.S. 844, 875-76 (1997) (quotation omitted). Thus, even collateral consequence laws that advance legitimate public welfare interests must be drawn with an eye toward that purpose.

Section 202.5 and many similar collateral consequence laws, however, impose restrictions far more expansive than reasonably necessary to advance any public safety objective. As the facts of this case well demonstrate, § 202.5 reaches conduct that presents no threat to public safety and has nothing to do with the state's valid interest in protecting minors. That provision applies to individuals convicted of an array of underlying offenses, many of which do not involve any contact with minors. *See* N.C. Gen. Stat. § 14-208.6(4). And it is far from clear that application of

§ 202.5 to individuals convicted of crimes involving only adult victims does anything to achieve the law's objective of protecting children.

Section 202.5 is by no means unusual in its overreach; many collateral consequence laws are likewise far too expansive to be fully justified on public welfare grounds. Blanket firearm bans applicable to anyone convicted of a felony (which exist under both federal and state law) illustrate the point. While some circumstances may well justify certain restrictions on firearm possession, "there is no evidence that prohibiting an individual with a fraud conviction from possessing a firearm advances public safety." NACDL Report at 35. Similarly, while banning some people who have been convicted of certain types of sex offenses from public housing may advance legitimate public safety goals, under current law "those convicted of public urination in California are barred for life from public housing," even while individuals "convicted of more serious violent offenses are not." NACDL Report at 33. Such results betray the mismatch between the public welfare aims many collateral consequence laws purport to advance and their actual effects.

The salutary objective of protecting public welfare is not a free license for government restriction of constitutional rights and liberties. The sweeping scope of many collateral consequence laws confirms the need for meaningful judicial checks to ensure that such provisions do not exceed constitutional limits.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,

v.

NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the
Supreme Court of North Carolina

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE THOMAS JEFFERSON CENTER FOR PROTECTION OF FREE EXPRESSION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

Located in Charlottesville, Virginia, the Thomas Jefferson Center is a nonprofit, nonpartisan institution whose sole mission is the protection of the First Amendment rights of free speech and free press. Since its founding in 1990, the Center has pursued its mission in a variety of ways, including the filing of amicus curiae briefs in federal and state courts across the country.

As organizations dedicated to protecting the First Amendment interests of the news media, *amici* have an interest in ensuring that the public can access news without government interference.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

N.C. Gen. Stat. § 14-202.5 violates the First Amendment because it restricts access to news websites. But while *amici* support Petitioner's argument that this particular law interferes with his First Amendment rights, we write to emphasize how any regulation that directly targets online speech and social media, and therefore the ability to receive news, affects the constitutional rights of the media and of citizens themselves to participate in the full range of informed civic engagement.

The North Carolina Supreme Court indicated that the statute applies to news websites such as www.nytimes.com, and the plain language of the statute supports such a reading. Such a statute is incompatible with the First Amendment rights of both the news media generally and the individuals covered by the statute. Laws that directly target the communication of news and information must be subject to the strictest scrutiny.

Statutes that seek to restrict content in this manner substantially burden the news media's ability to disseminate information in an effective manner. They do so by restricting the number of readers who may access and pay subscription fees to the news website and by limiting the reach of news stories that are increasingly delivered to readership through social media platforms such as Facebook. Any law that targets such a broad range of online news consumption raises serious First Amendment concerns, regardless of the underlying governmental interest, in this case the protection of minors.

ARGUMENT

I. Laws Restricting Access to News Websites Infringe on the First Amendment Right to Receive Information.

Any law that restricts a reader's ability to access news websites affects the constitutional rights of the reader and the news media. The First Amendment protects the right of the reader to receive information and ideas from the news media both as an extension of the news organizations' own First Amendment right to disseminate information and as a necessary predicate to the reader's ability to exercise the First Amendment rights of speech and civic engagement. The broad sweep of the North Carolina law has a substantial effect on these First Amendment rights.

A. The North Carolina Supreme Court Has Opened the Door to Applying § 14-202.5 to Restrict Access to News Websites.

A plain reading of the North Carolina law in question suggests that registered sex offenders in North Carolina may not access certain for-profit newspaper, TV news and radio news websites. The statute makes it unlawful for a registered sex offender to access a "commercial social networking Web site where the sex offender knows that the site permits minor children to become members." N.C. Gen. Stat. § 14-202.5(a)–(b). But the definition of "commercial social networking Web site" is so broad as to capture nearly every major media website containing a comment section and allowing minor users, including *The New York Times*, *The Washington Post*, and *The Wall Street Journal*. *Id.* Specifically, a website

constitutes a "commercial social networking Web site" if it allows minors to become members and if it:

> (1) Is operated by a person who derives revenue from . . . the Web site.
>
> (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
>
> (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.
>
> (4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger. N.C. Gen. Stat. § 14-202.5(b).

News websites appear to satisfy the four requirements of § 14-202.5(b) as they (1) generate advertising revenue; (2) facilitate the exchange of information in the form of commenter opinions; (3) allow (and often require) commenters to create personal profiles that contain names or nicknames; and (4) have mechanisms designed for discussion between commenters.

The Court of Appeals of North Carolina found that the statute's ban is "much more expansive" than merely prohibiting access to "mainstream social networking sites such as Facebook.com and Myspace.com," extending potentially even to "sites such as Google.com and Amazon.com because these sites contain subsidiary social networking pages." *State v. Packingham*, 229 N.C. App. 293, 302, 748 S.E.2d 146, 153, *review allowed, writ allowed, appeal dismissed*, 367 N.C. 256, 749 S.E.2d 842 (2013), *and rev'd*, 368 N.C. 380, 777 S.E.2d 738 (2015).

The North Carolina Supreme Court did not dispute that the statute could apply to news websites. It found that a website that requires "no more than a username and an email address to reach the page does not *necessarily* violate the statute," but certainly "a site that generates or creates a Web page or a personal profile for the user and otherwise meets the requirements of the statute is prohibited." *State v. Packingham*, 368 N.C. 380, 390 (2015) (emphasis added). The court went on to conclude that constitutionally adequate substitutes existed for news websites such as nytimes.com and provided as one example WRAL.com, NBC's local news affiliate. *Id.* This news website fell outside of the statute's ban, according to the court, because it requires users to be at least eighteen years old — not because it is a news website. *Id.*; *see also id.* at 400 (Hudson, J., dissenting) ("[T]he statute also likely includes . . . even news sites.").

The State's Brief of Opposition argues that the news media site "nytimes.com is not covered by the statute because the site does not allow for creation of detailed personal user pages that link to other users'

personal pages . . ." Opp. 30, 31. This characterization of subsection (b)(3) is incorrect for two reasons. First, subsection (b)(3) has no "detail" requirement; it only requires that the website's users can create Web pages or profiles that contain some information. The website nytimes.com allows users to create "profiles" containing name, location, and a photo, and the website alerts users: "Your profile is public. It will appear with any comments you leave on NYTimes.com." This information satisfies the (b)(3) requirements. Second, the Brief in Opposition's argument is based on a faulty reading of the conjunctive "and" in subsection (b)(3), which leads the State to claim that (b)(3) contains two independent requirements: a personal profile *and* the ability to link user pages. Opp. 30 n.8. In fact, the State argues that "[t]he function of linking to other users' pages is *the hallmark* of a social networking site" under the purview of the statute. *Id.* (emphasis added).

The State, however, overlooks the controlling phrase "such as" earlier in the same sentence, which indicates that the ability to link to other users' pages is just one of several examples of information contained in a personal profile of a "commercial social networking Web site"; creating a user nickname, disclosing personal information such as location, or uploading a user photograph are similarly sufficient but not necessary to satisfy the subsection. This reading is also consistent with the structure of the statute. If, as the State claims, linking user pages is a separate, independent requirement of a "commercial social Web site," the statute would have been drafted to include five, rather than four, subsections.

Judge Hudson of the North Carolina Supreme Court confirmed this reading of subsection (b)(3) in a dissenting opinion: "[T]he statute's description of a 'personal profile [ ],' and the language 'such as' when referring to the information that can appear in such profiles, could bring within the statute's scope many websites that allow users to register by going through the minimal process of creating a username and adding an email address or telephone number. . . . [T]he statute [ ] likely includes . . . even news sites like the websites for *The New York Times* and North Carolina's own *News & Observer*." *Packingham*, 368 N.C. at 400 (Hudson, J., dissenting). The majority opinion did not dispute that news websites could fall under subsection (b)(3), making the resolution of this case in a way that protects the information access rights of readers of considerable importance to *amici*.[2]

B. The First Amendment Protects the Right of Readers to Receive Information and Ideas.

As the Supreme Court has repeatedly affirmed, it is "well established that the Constitution protects the right to receive information and ideas. 'This

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[2] Even assuming, for the sake of argument, the statute does not apply to news websites, the ambiguity forces the Petitioner and similarly situated individuals to make legal determinations and risk calculations before reading news online, suggesting that the statute is unconstitutionally vague. "[A]n enactment is void for vagueness if its prohibitions are not clearly defined," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), and "[t]his appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Colautti v. Franklin*, 439 U.S. 379, 391 (1979) (citing *Grayned*, 408 U.S. at 109).

freedom (of speech and press) . . . necessarily protects the right to receive [information.]'" *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)); *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."); *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 216 (2003) (Breyer, J., concurring) (quoting *Stanley* and arguing for heightened scrutiny where a statute "directly restricts the public's receipt of information"). Furthermore, "[t]his right to receive information and ideas, regardless of their social worth, . . . is *fundamental* to our free society." *Stanley*, 394 U.S. at 564 (emphasis added).

Justice Brennan, writing for a plurality of the Court in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982), noted that this right to receive information has been upheld in a "variety of contexts." *Id.* at 866–67. For example, in *Thomas v. Collins*, 323 U.S. 516 (1945), the Court found that a worker has the right to listen to a union organizer's speech. *Id.* at 534. In *Martin*, the Court upheld the principle that a person has the right to receive literature from others. 319 U.S. at 149. And in *Stanley*, the Court affirmed that an individual has the right to read obscene materials in his own home. 394 U.S. at 568. This right similarly extends to receiving news from news websites and receiving information contained in the comment sections of those websites. Because of this well-established First Amendment right to receive information, any statute that restricts the receipt of online news stories clearly targets core First

Amendment activity and must face the strictest scrutiny.

C. The Right to Receive Information is an Extension of the Press's First Amendment Right to Distribute News and is a Prerequisite for the Recipient's Exercise of Speech Rights and Civic Engagement.

There are two reasons why individuals have the constitutional right to listen to what others have to say. The first, as Justice Brennan laid out in *Pico*, is that "the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them." *Pico*, 457 U.S. at 867 (plurality). If news organizations want to reach readers, they have the right to have their ideas "receive[d] and consider[ed]." *Id.* (quoting *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring)). A primary purpose of the First Amendment is to "encourage[] lively discussion, robust debate, and ultimately a better informed citizenry." Eugene Ho, *The Constitutional Right to Watch Television: Analyzing the Digital Switchover in the Context of the First Amendment*, 57 Am. U. L. Rev. 179, 215 (2007).

This First Amendment purpose is thwarted if the government "assume[s] a guardianship of the public mind through regulating the press [and] speech . . . ." *Thomas*, 323 U.S. at 545 (Jackson, J., concurring). Where a state criminally bars individuals from accessing online news, it restricts the free flow of ideas. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the

free flow of ideas and opinions on matters of public interest and concern."); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("[T]he government itself shall not impede the free flow of ideas."). As the noted First Amendment scholar Rodney Smolla put it, "without both a listener and a speaker, freedom of expression is as empty as the sound of one hand clapping." Rodney A. Smolla, *Free Speech in an Open Society* 198 (1992). In this case, restricting the rights of one category of criminal offenders to receive information from news organizations impacts news organizations' First Amendment right to write and disseminate that information to the broadest of audiences.

The second reason for recognizing a listener's right is that receiving information is "a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Pico*, 457 U.S. at 867 (plurality). As the Court has noted, "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial . . . ." *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969). The right to receive information, therefore, not only exists to improve the quality and depth of public debate, but also to protect individuals' rights to "silently quarry or sample public culture for information that will enlighten, enrich, or simply entertain them." Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and A First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. Rev. 799, 800 (2006). As the Supreme Court laid out in *Stanley*, "If the First Amendment

means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." 394 U.S. at 565. The government should not be allowed to make it a criminal offense for readers to "satisfy [their] intellectual . . . needs," *id.*, by accessing news websites.

In addition, the Supreme Court has consistently held that free discussion of governmental affairs is the core of expressive activity the First Amendment is intended to protect. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964), as the right of "citizens to know what their Government is up to" defines "a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (internal quotation marks omitted). Individuals who are denied access by the force of criminal law to news sites such as *The New York Times*, *The Wall Street Journal*, and *The Washington Post* are deprived of information essential to becoming well-informed citizens.

Here, the State of North Carolina has criminalized the reading of news online for a category of readers. The statute implicates the First Amendment right to receive newsworthy information by interfering with the ability of these readers to access information made available to the general public by the nation's news media.

II. Content-Restrictive Laws Like North Carolina's Statute Prevent News Organizations from Ensuring That Works of Journalism Effectively Reach Readers.

Beyond their First Amendment implications, laws that restrict access to content impose practical burdens on the dissemination of meaningful journalism, because the contemporary model of journalism depends on online readership and engagement, often through social media. In addition, the unique nature of journalistic content means that one website cannot serve as an adequate substitute for another, and so such restrictive laws directly limit the availability of diverse sources of journalism. Finally, laws like this one target one of the most essential methods of news dissemination today: audience engagement through social media platforms such as Facebook, Twitter, Snapchat, and Instagram.

A. Such Statutes Threaten One Contemporary Model of News Dissemination.

The North Carolina statute extends to a substantial majority of news sites and only those sites that forbid access to minors escape its regulatory prohibitions. The statute's reach is broad, given the prevalence of comment sections and the civic mission of news organizations to seek to inform audiences of all ages. It is the default, not the exception, for news organizations to allow readers to discuss and debate news articles in the comment sections. Cherilyn Ireton et al., *Do Comments Matter? Global Online Commenting Study 2016* (Oct. 2016), http://bit.ly/2hREwqb. A recent study by the World

Association of Newspapers and News Publishers report showed that "82% of those we surveyed . . . invite their readers to comment on their sites." *Id.* at 5. A sampling of the largest circulation newspapers in North Carolina shows that papers tend to allow and encourage readers to comment on news articles online. *See* www.newsobserver.com (website of The Raleigh News & Observer); www.charlotteobserver.com (website of The Charlotte Observer); www.fayobserver.com (website of the Fayetteville Observer). Additionally, each of these newspaper sites allows minors to access their websites, bringing the websites under the statute. *See News & Observer Terms of Service*, The Raleigh News & Observer, https://perma.cc/Z8LB-FLA7 (allowing online access to minors with parental consent); *Charlotte Observer Terms of Service*, Charlotte Observer, https://perma.cc/B4PH-9VKT (same); *see also Fayetteville Observer Terms of Use*, http://bit.ly/2hnWEEu (allowing access to readers who are 13 years old or older). Thus, the statute has a significant impact on where the Petitioner and similarly situated individuals can obtain news online about current events of local importance.

The statute also prohibits the Petitioner from accessing leading national news websites. The New York Times' www.nytimes.com is swept up in the list of proscribed media under the North Carolina law, as described above, but it is hardly alone. The terms of use agreements for websites hosted by *USA Today*, *The Washington Post*, and *The Wall Street Journal*, for example, allow minors to access their websites while also allowing user communication of the sort targeted by the statute. *See Terms of Service*, N.Y.

Times, http://nyti.ms/1M2gj8c (permitting access to the website to anyone older than 13 years of age); *USATODAY.com Terms of Service*, USA Today (Sept. 23, 2013), http://usat.ly/2hO10pm (permitting access to social-media features of the website to anyone older than 13 years of age); *Terms of Service*, Wash. Post (Jul. 1, 2014), http://wapo.st/2hlenMW (allowing access for anyone older than 13 years of age while requiring a Facebook account for age-verification and registration purposes); *Subscriber Agreement & Terms of Use*, Wall Street Journal (Nov. 25, 2015), http://on.wsj.com/2i3JtMX (allowing minors to purchase an online subscription with the consent of a parent or guardian).

Moreover, contemporary trends in the news industry suggest that the prohibitions such as the ones in the North Carolina law will become more problematic as news organizations shift resources to their digital products. Increasingly, American adults receive their news online. As of early 2016, only 20% of American adults often received news from print newspapers, and nearly twice as many adults (38%) received news regularly online. *See* Amy Mitchell, Jeffrey Gottfried, Michael Barthel, and Elisa Shearer, *Pathways to News*, Pew Research Center (Jul. 7, 2016), http://pewrsr.ch/29AWwzC. This trend is expected to grow, because younger audiences exhibit a clear preference for online news. About half of adults age 18 to 49 often get news online, and only 5% of 18-to 29-year-olds often get news from a print newspaper. Accordingly, news organizations increasingly need an online presence to reach an audience.

Though news organizations in many cases initially offered the public free access to articles online,

there has been a shift to digital subscriptions that allow users access to articles that are otherwise kept behind "pay walls." For example, starting in late 2012, "visitors to The [Raleigh] News & Observer website will be asked to pay after reading a limited number of articles for free." Will Huntsberry, *News & Observer Prepares Pay Wall to Charge Users for Online Access*, INDY Week (Dec. 12, 2012), http://bit.ly/2i9DHFp. Similarly, nytimes.com has increased its digital customer base to 2.5 million subscribers and other newspapers have reported significant increases in online readership. Ken Doctor, *Behind the Times' Surge to 2.5 Million Subscribers*, Politico (Dec. 5, 2016), http://politi.co/2gGK59M ("The Washington Post is up 73% from the first half of the year, and the Boston Globe told me this week of an immediate tripling [of] its digital subscription post election.").

While one purpose of a pay wall is to collect a subscription fee, consumer information gathered "through the registration process also has potential value to advertisers." Lucia Moses, *Why Publishers Struggle to Monetize Their Paywall Data*, DigiDay (Jun. 1, 2015), https://perma.cc/BW9C-EX4B. As more news moves to the Internet, any statute that seeks to impose legal restrictions access to journalistic content would create significant burdens for news organizations, threatening one contemporary business model for publishing and raising the possibility that quality reporting will decrease in response to market pressures.

B. News Consumers Do Not Have Ready Substitutes for Proscribed News Sites.

The North Carolina Supreme Court majority presumed in its ruling that although certain news sites were proscribed under the statute, "numerous alternatives . . . provide the same or similar services that defendant could access without violating N.C.G.S. § 14–202.5." *Packingham*, 368 N.C. at 390. This statement rests on the fallacy that individual news websites can be substituted for one another. In fact, news organizations, including those based in North Carolina, compete to publish and broadcast groundbreaking reporting and distinctive editorial opinions which other outlets cannot replicate. *See, e.g.*, Joseph Neff, *SEANC Executive Director Dana Cope's Spending Decisions Draw Fire*, The Raleigh News & Observer (Feb. 7, 2015), https://perma.cc/EDT5-FGJ2 (This article and a series of follow-up articles exposed corruption and a lack of oversight at a North Carolina employees' union, earning its author first-place honors for investigative reporting from the North Carolina Press Association in 2015.) Because of the unique material produced by news organizations such as *The Raleigh News & Observer* and *The New York Times*, they cannot simply be replaced by other websites.

Moreover, daily newspapers in many mid- and small-market localities play an outsized role in coverage of local governments. *Media Coverage of City Governments*, Pew Research Center (Jul. 29, 2010), http://pewrsr.ch/2h7oRBF ("In the suburbs, 75% of stories related to government came from newspapers."). It is therefore unlikely that consumers barred from accessing their local newspaper website

will have an alternative that provides comparably thorough coverage of their local city or county government.

C. Even if a Statute Merely Proscribes Access to Social Media Sites It Has a Substantial Impact on News Organizations' Ability to Reach Readers.

Even if this statute is read narrowly to exclude direct access to newspaper websites, it clearly applies to social media sites. As such, a statute like this still greatly restricts the availability of news and information.

News organizations increasingly rely on social media sites to distribute articles online and attract readers to their websites. This is a necessary adaptation of the news media, because a majority of American adults—62%—get their news on social media. *See* Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, Pew Research Center (May 26, 2016), http://pewrsr.ch/2h6RdMm (summarizing a 2016 survey by Pew Research Center conducted in association with the John S. and James L. Knight Foundation). For example, 67 percent of U.S. adults have accounts on Facebook and 44 percent of U.S. adults receive news coverage through the site. Similarly, YouTube, which reaches nearly half of American adults, provides news to about 21% of its users, and Twitter, which has a smaller user base than these other sites (16% of American adults), still provides news to about 59% of its users. *Id.* These are not perfectly overlapping audiences, either; of those who receive news on at least one social

media site, a majority receive news from only one site—usually Facebook. *Id.* As such, Facebook is more than a place that people learn about a news story. It is, for many adults, the sole source of online news.

Facebook and similar social media sites also serve as a large referral service for news organizations to reach potential new readers, as users regularly post and click on hyperlinks posted to social media sites and are then directed to a news website. *See* Amy Mitchell et al., *The Role of News on Facebook*, Pew Research Center (Oct. 24, 2013), http://pewrsr.ch/2hOXnSA (reporting that about "two-thirds (64%) of Facebook news consumers at least sometimes click on news links"). Because of changing consumer preferences, social media sites are important platforms for the promotion and dissemination of news.

Not only does North Carolina's statute inhibit the Petitioner in his ability to obtain information on current events, it curtails significantly news organizations' ability to reach an audience to encourage informed civic debate and discussion.

CONCLUSION

For the foregoing reasons, *amici* ask the Court to overturn the ruling of the North Carolina Supreme Court and find that N.C. Gen. Stat. § 14-202.5, which restricts the receipt of news and information, violates the First Amendment.

Respectfully submitted,

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In the Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

BRIEF FOR STOP CHILD PREDATORS AND SHARED HOPE INTERNATIONAL AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Stop Child Predators ("SCP") is a non-profit organization established in 2005 to combat the sexual exploitation of children. SCP works with lawmakers and law-enforcement agencies to design public-policy measures to prevent child sex abuse. SCP also seeks to raise awareness regarding children's vulnerabilities online, and to educate parents and communities about best practices for protecting child privacy and preventing online abuse.

Shared Hope International ("Shared Hope") is a non-profit organization established in 1998 to assist the victims of sex trafficking worldwide. Every year, Shared Hope provides housing, medical care, and vocational training to hundreds of sex-trafficking victims in the United States, Jamaica, Nepal, and India. Shared Hope also provides policymakers with data-driven research on sex trafficking so that they can make informed decisions in the effort to curb sex trafficking and heal its victims. Shared Hope recently filed an amicus brief in this Court in another case implicating its mission to combat sex trafficking. *See* Brief for Amici Curiae in Support of Petitioner, *Doe v. Backpage.com, LLC*, No. 16-276 (Sept. 29, 2016).

SCP and Shared Hope can offer this Court a unique perspective on the North Carolina statute at issue, N.C. Gen. Stat. § 14-202.5 ("Section 202.5"), by placing the social-networking restriction in its proper context.

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[1] The parties have given blanket consent to the filing of amicus curiae briefs in support of either or neither party. No counsel for a party authored this brief in whole or in part; and no one other than amici or their members made a monetary contribution intended to fund the preparation or submission of this brief.

Research and experience support North Carolina's efforts to target social-networking sites and registered sex offenders, in particular, as part of its broader effort to stop the sexual exploitation of children before it starts. Online social-networking platforms are important vehicles for recruiting child sex-trafficking victims and for the sexual victimization of children more generally. And previously convicted and registered sex offenders are the most identifiable and likely class to target children online. This Court should uphold North Carolina's tailored effort to keep convicted sex offenders away from social-networking platforms where children are most vulnerable.

INTRODUCTION AND SUMMARY OF ARGUMENT

Child sex abuse and trafficking is a multi-faceted problem calling for innovative policy approaches that combat and deter the abuse of children before it occurs. Research has shown that online social-networking platforms have become important conduits for the sexual victimization of children. North Carolina has responded to that problem by enacting a social-networking restriction that keeps the most likely offenders (*i.e.*, previously convicted and registered sex offenders) away from their potential victims in the forums where they are most vulnerable. The North Carolina law, and others like it, are an important part of the larger effort to deter sex offenders and protect children before they become victims.

Section 202.5 places restrictions on convicted sex offenders' ability to access a certain class of websites: commercial social-networking websites that permit children to use them. Petitioner does not dispute that this statute is intended to work in conjunction with

other laws designed to deter and combat the sexual abuse of children, and that combating child sex abuse is the most compelling of interests. Petitioner instead argues that Section 202.5 is not narrowly tailored to serve that interest. But North Carolina specifically targeted social networking sites and registered sex offenders for very good reasons that are backed by research, data, and the stories of countless victimized children.

To be clear, amici do not suggest that children are unsafe on social-networking sites; that children are safe if they stay away from social-networking sites; that all sex offenders use social-networking sites to recruit children; or that the North Carolina statute is going to rid the State of such horrific crimes. Rather, the purpose of this brief is three-fold: First, to explain how social-networking sites work and why they appeal to sex offenders and present a special danger for children. Second, to document the very real problem of online recruiting, grooming, and targeting that Section 202.5 was designed to address. And, third, to explain why restricting a registered sex offender's use of commercial social-networking platforms is a narrowly tailored way to accomplish the compelling goal of protecting children online.

ARGUMENT

I. SECTION 202.5 GUARDS CHILDREN'S PRIVACY ON THE PLATFORMS WHERE THEIR PERSONAL INFORMATION IS MOST READILY AVAILABLE

A. Social-Networking Platforms Offer Windows Into Their Users' Personal Lives

Users of Facebook, Twitter, and other popular

commercial social-networking platforms share personal information with their family, friends, and complete strangers. Information-sharing, on the one hand, and information-gathering, on the other, are both central to the business models of social-networking sites and to those sites' user experience.

Take the simple example of Facebook photo-sharing: when Sara posts a photo of her friends Rachel and Jane, she has the option of "tagging" both Rachel and Jane so that the photo shows up on the personal profiles of those other users. Anyone who can access the personal profiles of either Rachel, Jane, or Sara now has access to the photo, and may be able to comment on it in a running comment stream that appears simultaneously on each user's profile. Depending on the user privacy settings, the photo may be visible to their friends, to friends of their friends, or to the broader public.

The photo's posting generates information in three ways. First, and most obviously, it broadcasts photographic information about Sara and her friends, Rachel and Jane. Second, anyone with access to the photo can add information through comments and responses. Third, the posting and tagging of the photo—especially when it generates positive comments and "likes"—may induce Sara, Rachel, and Jane to post more photos and otherwise interact more on the site. *See* Moira Burke et al., *Feed Me: Motivating Newcomer Contribution in Social Networking Sites*, *in* Proceedings of the SIGCHI Conference on Human Factors in Computing Systems 945, 953 (2009).

The primary use of social-networking platforms for many, however, is not to share information. It is to passively observe the lives of friends, acquaintances,

and strangers. Among people with Instagram (photo-sharing) accounts, for example, fewer than half report actually posting any photos on a regular basis. *See* GlobalWebIndex, *Passive Facebooking: GWI Trends Q1 2015* at 3 (2015). The proportion of passive users on various social-networking platforms—including Facebook, Tumblr, Pinterest, Twitter, and Myspace—is roughly consistent across platforms. *Id.*

From a user's point of view, what distinguishes social-networking platforms from other kinds of websites is their capacity for this kind of passive use. Internet users have long had the ability to maintain personal blogs and to share information with large numbers of friends and family through email and other messaging services. But social-networking platforms permit their users to obtain—with little effort and all at once—a detailed and extensive look into the lives of many other users, even those who are not "friends." Indeed, it is not uncommon for social-media users to spend the better part of a day browsing through the announcements, photos, and comments of others. *See* Maria Konnikova, *How Facebook Makes Us Unhappy*, New Yorker (Sept. 10, 2013), http://bit.ly/XNbjOO. Colloquially known as "stalking" or "creeping," this behavior is a widely acknowledged and accepted feature of social-media use. *See* Danah Boyd, *It's Complicated: The Social Lives of Networked Teens* 13 (2014); Emma Golden, *Internet Stalking 101: The Dos and Don'ts of Internet Creeping*, Thought Catalog (Feb. 20, 2014), http://tcat.tc/1WkXKmF.

B. Children Are Avid And Vulnerable Users Of Social-Networking Platforms

1. The Social Lives Of Teens Often Revolve Around Social-Networking Platforms

In the United States today, most teenagers' social lives revolve around online social-networking platforms, accessible at all hours and on numerous devices.

A recent Pew study showed that eight in ten American teens use at least one social-networking site, and that such use is widespread among children across socioeconomic, gender, and racial lines. *See* Pew Research Center, *Teens, Social Media, and Privacy* 19-21 (2013), http://pewrsr.ch/1A8kvvy ("2013 Pew Research Study").[2] On these sites, teens share more information about themselves—and a greater variety of information (*e.g.*, pictures, text messages, videos, etc.)—than ever before. *See id.* at 3. They usually share across multiple platforms. *See* Pew Research Center, *Teens, Social Media & Technology Overview 2015: Smartphones facilitate shifts in communication landscape for teens* 3 (2015), http://pewrsr.ch/1JuUZFg (71 percent of teens use more than one social-networking site). And they are online "almost constantly" throughout the day. *Id.* at 2.

Social-networking platforms have replaced malls and parks as the place where teens gather. They use

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[2] All of the "teen" research cited in this brief examined samples of children aged 17 or younger. *See, e.g.*, 2013 Pew Research Study at 80; Pew Research Center, *Teens, Social Media & Technology Overview 2015: Smartphones facilitate shifts in communication landscape for teens* 41 (2015), http://pewrsr.ch/1JuUZFg.

social-networking sites to form and manage independent identities and relationships with their peers. As a leading scholar on teens' use of social media explained, social-networking sites "are in many cases the only 'public' spaces in which teens can easily congregate with large groups of their peers. More significantly, teens can gather in them while still physically stuck at home." Boyd, *supra*, at 21.

And teens have a particular preference for social-networking platforms that their parents have not joined. *See id.* at 59. There are reports that Facebook, which has a broad user base among adults, has had trouble keeping younger users engaged with the site as teens have migrated to "trendier" platforms (*e.g.*, Instagram and Snapchat) that are free from the watchful profiles of their parents. *Id.*; Sharon Gaudin, *Facebook is leaking valuable younger users*, Computerworld (Oct. 18, 2016), http://bit.ly/2dMwYzq. That online distance from the eyes of parents gives teens an equal measure of independence and vulnerability: surveys of youth internet use have measured an uptick in online harassment and peer-to-peer cyberbullying enabled in part by social-networking platforms. *See* Lisa M. Jones et al., *Trends in Youth Internet Victimization: Findings From Three Youth Internet Safety Surveys 2000-2010*, 50 J. Adolescent Health 179, 184 (2012).

2. Teens Have Trouble Keeping Their Online Interactions Private

Despite their desire to avoid parental intrusions into their social-networking spaces, many teens evince a troubling lack of concern for the privacy of the personal information they post online. Sixty percent of teen social-media users told the 2013 Pew surveyors

that they are "not too" concerned or "not at all" concerned about third-party access to the information they post on social-networking sites. 2013 Pew Research Study at 10. And many teens choose to share highly personal information on their social-media profiles. Twenty-three percent of Facebook users aged 14 to 17 post their cellphone numbers on their Facebook accounts. *Id.* at 4. Sixteen percent set up their social-media posts to automatically include their physical location. *Id.* at 34. Nineteen percent report having posted an update, comment, photo, or video that they later regretted sharing. *Id.* at 65.

Even children who seek to maintain online privacy and restrict their universe of social-networking contacts have trouble doing so. "More often than not, what people put up online using social media is widely accessible because most systems are designed such that sharing with broader or public audiences is the default." Boyd, *supra*, at 12. "Because of this public-by-default framework, most teens won't bother to limit the audience who can see what they consider to be mundane conversations on Facebook." *Id.* at 62.

According to the 2013 Pew study, the majority of teen Twitter users broadcast their tweets on a "public" basis. 2013 Pew Research Study at 5. And 39 percent of teen Facebook users maintain public or only semi-private profiles. *Id.* at 7. Even when users adopt privacy settings that restrict the audience for their social-media postings, other users can (and do) circumvent those settings—and information about how to do so is widely available. *See, e.g.*, Candice Jalili, *4 Legit Ways to Stalk Someone on Facebook Without Looking Like a Total Creep*, EliteDaily (June 9, 2016), http://elitedai.ly/1UsRiTS. The problem is

compounded by teens' powerlessness over the things others say or post about them online. *See* Boyd, *supra*, at 49-51. In sum, "teens cannot easily control the flow of information on social media." *Id.* at 61.

3. Teens Are Subjected To Sexual Solicitation And Harassment On Social-Networking Platforms

In this social media environment, the online solicitation and harassment of teens by strangers has become a real problem. In 2013, 24 percent of girls and 10 percent of boys—17 percent of all youth social-media users—reported having been contacted via social-networking sites by a stranger in a way that made them feel scared or uncomfortable. *See* 2013 Pew Research Study at 78. Those figures are consistent with the results of a 2006 study reporting that one in seven children had received unwanted sexual solicitations online and that one in eleven children had been subjected to some other form of harassment. *See* Janis Wolak et al., National Center for Missing & Exploited Children, *Online Victimization of Youth: Five Years Later* 1, 17 (2006), http://bit.ly/1nfeJDh.[3]

Many teens never report these acts of solicitation and harassment to their parents or to the authorities. According to one study, approximately 47 percent of teens who receive unwanted sexual solicitations online

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[3] Although the 2006 study examined online solicitation and harassment in a variety of internet venues, such behavior had already started to migrate to social media by that time. *See* Kenneth V. Lanning, National Center for Missing & Exploited Children, *Child Molesters: A Behavioral Analysis* 130 (5th ed. 2010), http://bit.ly/MtDkWe (noting a major shift between 2000 and 2006 from acts of solicitation initiated in internet chat rooms to acts of solicitation initiated on social-networking platforms).

tell no one. *See* Gisela Priebe et al., *To tell or not to tell? Youth's responses to unwanted Internet experiences*, 7 Cyberpsychology: Journal of Psychosocial Research on Cyberspace at Table 1 (2013), http://bit.ly/2jSTkSw. Among the teen respondents who told researchers that they had failed to notify anyone of unwanted solicitations, the most common explanation was that the solicitations were "[n]ot serious enough" or "[h]appen[ed] all the time." *Id.*

II. SOCIAL-NETWORKING PLATFORMS ARE KEY TOOLS FOR SEX TRAFFICKERS AND OTHER SEX OFFENDERS

A. Sex Traffickers Use Social-Networking Platforms To Identify And "Groom" Children For Prostitution

For years, social-networking platforms have served as key venues for the recruitment of children into the sex trade. The Justice Department's 2016 National Child Exploitation Threat Assessment recognized that sex-trafficking offenders "are using social networking sites as a tool to identify and recruit underage victims," and described social-networking sites—alongside schools, strip clubs, and casinos—as among "[t]he most common physical and online venues used to recruit child victims." U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* 76-77 (2016), http://bit.ly/1MNIquU ("2016 DOJ Report").

Independent research on modern sex-trafficking has likewise observed a "pattern[]" among child sex-traffickers of using "social networking sites . . . in the recruitment of victims." Mark Latonero, Univ. of

S. California, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds* 18 (2011), http://bit.ly/2iGT9fw. In addition to recruitment, traffickers also increasingly use these sites "to advertise victims for the purposes of prostitution. As escort and social networking websites have grown in number, they have . . . become the most popular platform to advertise sex trafficking victims." 2016 DOJ Report at 77.

Pimps "search[] Facebook for attractive young girls, and sen[d] them messages telling them they [a]re pretty and asking if they would like to make some money." Erica Fink & Laurie Segall, *Pimps Hit Social Networks to Recruit Underage Sex Workers*, CNN Money (Feb. 27, 2013), http://cnnmon.ie/2iBQrEN. These efforts are often conducted on a mass scale, ensnaring hundreds of innocent victims. For example:

- Between 2011 and 2013, a multiagency task force in the Southern District of California uncovered a racketeering operation involving nearly 40 gang members and associates who prostituted "vulnerable juvenile females who were runaways or from broken homes. Pimps . . . conducted extensive online recruitment via various social networking websites, including MySpace, Facebook, and Twitter." 2016 DOJ Report at 43.

- A recent federal prosecution in the Eastern District of Virginia involved a child-sex-trafficker who had amassed a collection of fake Facebook accounts

> that he used to target vulnerable teens. On just one of those accounts, FBI agents found over 800 messages to targeted girls. Fink & Segall, supra.

Traffickers use "the scale and popularity of online [social-networking] services to essentially hide in plain sight." Alex Whiting, *How traffickers use social media to lure vulnerable teenagers into sex work*, Venturebeat (Nov. 15, 2015), http://bit.ly/1HU4WKA (quoting Mark Latonero, director of the University of Southern California's Technology and Human Trafficking Initiative).

B. Other Sex Offenders Similarly Gather Personal Information And Target Children Through Social-Networking Platforms

Sex offenders routinely use social-networking platforms to victimize children in other ways too. One increasingly prominent method of victimization is the "sextortion" scheme, whereby an online stranger convinces a child to transmit sexually explicit images of herself or himself, then threatens to release those images to friends and family unless the child continues posing for the abuser. *See generally* Benjamin Wittes et al., *Sextortion: Cybersecurity, teenagers, and remote sexual assault*, Center for Technology Innovation at Brookings (2016), http://brook.gs/2iHlIcy. The abuser also often coerces the victim into participating in livestreamed, sexually explicit video sessions that can be broadcast around the world. *See* 2016 DOJ Report at 75. As the Justice Department's 2016 report on child exploitation notes, "the exponential rise in the use of web cameras and camera-enabled mobile devices has ... resulted in an

observable increase in child sexual exploitation via real-time online streaming live video." *Id.*

Sextortion schemes often begin with enticement through social-networking platforms, where "offenders . . . specifically seek[] out those children they consider[] easy targets because of their demonstrated willingness to post personal content online and engage in live-streaming video activity, whether the content [is] sexually explicit or not." *Id.* at 76. Frequently the abuser will exploit his victim using the same platform on which he makes initial contact. *See id.* at 143. The Brookings Institution estimates that social-media manipulation is a factor in 91 percent of sextortion cases involving minor victims. *See* Wittes et al., *supra*, at 12.

The ease and efficiency with which abusers can exploit children in this fashion means that "[s]extortion cases tend to have more minor victims per offender than all other child sexual exploitation offenses. Unfortunately, it is . . . common for investigations to reveal that a single sextortion offender has been communicating with hundreds of potential victims." 2016 DOJ Report at 75.

A case in point is that of Lucas Michael Chansler, who between 2007 and 2010 abused nearly 350 young girls via social media. *See* Wittes et al., *supra*, at 18. Chansler, pretending to be a teenage boy, would contact his victims via social-networking sites, then ask to video-chat with the girls. Displaying video of a naked boy to hide his identity, Chansler would ask his victims to strip for him while he recorded the video conversations. Chansler would then threaten to release the recordings to the victim's parents or friends unless the victim agreed to supply more explicit videos.

Chansler told the FBI that he targeted young girls because they were most likely to comply with his demands. *Id.* at 19.

Prosecutions for the sexual solicitation and harassment of minors via social-networking platforms are now the daily fare of federal and state criminal dockets around the country. Even a cursory glance at press releases from the first few days of 2017 illustrates just how commonplace these crimes have become:

- In Maryland, a 30-year-old man posed as an 18-year-old and lured a 16-year-old girl on Facebook into an online relationship. The two regularly chatted on Facebook Messenger. The man eventually convinced the victim to send him nude photos of herself. After the victim blocked him on Facebook, the abuser opened several Facebook profiles in the victim's name, "friended" the victim's friends, and sent them the nude photos. *See* U.S. Attorney's Office, District of Maryland, *Cockeysville Man Facing Federal Charges for Production and Distribution of Child Pornography in Sextortion Case* (Jan. 10, 2017), http://bit.ly/2iCcGKB.

- On the same day that the defendant in the above case appeared in court, a judge in the same judicial district was sentencing a 27-year-old man who prostituted a 15-year-old girl he found on Instagram. *See* U.S. Attorney's

Office, District of Maryland, *Prince George's County Pimp Sentenced to Over 14 Years in Federal Prison for Prostituting 15-Year-Old Child First Contacted Through the Internet* (Jan. 9, 2017), http://bit.ly/2k4UjTT.

- And, in Florida, a 34-year-old registered sex offender was sentenced for sharing child pornography and soliciting young girls on a social-networking site. *See* U.S. Attorney's Office, Middle District of Florida, *Registered Sex Offender Sentenced to More Than 19 Years for Second Offense Involving the Sexual Abuse of Minors* (Jan. 3, 2017), http://bit.ly/2iJWCGL.

III. SECTION 202.5 IS NARROWLY TAILORED TO FIT NORTH CAROLINA'S COMPELLING INTEREST IN PREVENTING CHILD SEX ABUSE ON SOCIAL-NETWORKING PLATFORMS

The research, data, and real-world examples detailed above amply explain why North Carolina targeted commercial social-networking sites in particular and why keeping sex offenders off social-networking platforms would directly address North Carolina's undisputed and indisputably compelling interest in protecting children from sexual exploitation. There are also good reasons why North Carolina chose to focus its social-networking restriction on registered sex offenders, and why many of the purportedly less restrictive alternatives proposed by Petitioner are also

less effective.

A. Registered Sex Offenders Are An Easily Identifiable Class With A Proven Tendency To Reoffend

This Court has previously recognized that "[s]ex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002). And it has specifically noted "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Smith v. Doe*, 538 U.S. 84, 103 (2003). As this Court explained, "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." 536 U.S. at 33.

In the years since *McKune* and *Smith*, those statistics have not meaningfully changed: convicted sex offenders today are four times more likely than persons convicted of non-sex offenses to be rearrested for sex crimes. *See* U.S. Dep't of Justice, *Sex Offender Management Assessment and Planning Initiative* 93 (2014), http://bit.ly/2j3qh1c. The risk of recidivism posed by sex offenders remains "frightening and high." *Smith*, 538 U.S. at 103 (quoting *McKune*, 536 U.S. at 34). And numerous studies have found significant rates of "crossover offending." *See* Resp. Br. 41. For example, "rapists often sexually assault children and incest offenders often sexually assault children both within and outside their family." U.S. Dep't of Justice, *Sex Offender Management Assessment and Planning Initiative* 61.

Faced with these statistics, North Carolina decided to focus its efforts on a class of individuals that had already proven to be a threat and that had a demonstrable risk of reoffending: previously convicted

and registered sex offenders. In North Carolina, this class includes child sex traffickers and sextortionists. *See* N.C. Gen. Stat. §§ 14-208.6(4)-(5), 14-208.7(a). The risk that these offenders will access the online personalities of children through social-networking platforms and use those platforms to sexually exploit children is quite real. And limiting social-networking access for a class of persons who pose a heightened statistical risk of abusing the information generated on those platforms is both reasonable and compelling.

B. Many Of Petitioner's Proposed "Less Restrictive Alternatives" Are Also Less Effective

Many of Petitioner's proposed "less restrictive alternatives" would also be considerably less effective in combatting the sexual exploitation of children online. Several are not "alternatives" at all—they are criminal laws that already exist and that have proven insufficient, standing alone, to redress the serious and multi-faceted problem of child sex abuse. Others ignore the practical (and proven) reality that placing the burden on children and their parents to self-protect from sex offenders lurking online is a dangerously incomplete answer.

Section 202.5 (and laws like it) do not stand alone. They are instead critical parts of the larger effort to stop the sexual abuse of children before it happens. So when Petitioner says that North Carolina should have passed a law targeting only the malicious conduct itself (*e.g.*, "criminalizing the gathering of information on social networking sites . . . for the purpose of targeting minors," Pet. Br. 48), he misses the point: such laws exist and yet our children remain at risk.

Take anti-solicitation statutes as an example.

Several states, including North Carolina, already prohibit the solicitation of minors online. *See* N.C. Gen. Stat. § 14-202.3. But law-enforcement officers have trouble finding and identifying individual acts of solicitation due to the volume of traffic on social-networking platforms and the reluctance of many children to report such acts. *See* Whiting, *supra*. A sex-trafficker might solicit hundreds of minors on social-networking platforms and remain uncaught until he is found prostituting his victims. *See supra* at 11-12. Section 202.5 provides law enforcement with a critical tool to prevent these offenders from gaining such easy access to their victims in the first place.

And, yes, parents and children should take affirmative actions to protect themselves against the risk that sex offenders will seek to access their personal information online. *See* Pet. Br. 51. But North Carolina does not have to blind itself to the practical reality that (a) they often do not (*see supra* at 7-9), and (b) even if they do undertake such measures, those measures may prove ineffective. A lurking social-networking user can gather information on a child whether or not that child has a parent's permission to be online.[4] And the children most at risk may not have the tools to protect themselves: those most vulnerable to abuse online are children with a history of "sexual or physical abuse, parental conflict,

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[4] Indeed, strangers can do much worse even to a child who is in the immediate physical presence of a parent. The Brookings Institution report on sextortion highlights the case of a 30-year-old offender who persuaded a 13-year-old girl to strip naked in front of her webcam—while her mother was in the room—on the pretense that she was changing clothes. *See* Wittes et al., *supra*, at 22-23.

substance use, low caregiver bonding, depression, [and] sexual aggression." Boyd, *supra*, at 124. Social-networking platforms have given those who would abuse children broad access to information useful for identifying and targeting such at-risk teens. Section 202.5 reasonably seeks to restrict that access.

CONCLUSION

For the foregoing reasons, and those set forth in Respondent's brief, the judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

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